SHANNON ELIZABETH EAGEN
52 Columbia, Irvine, CA • eagens@lawnet.uci.edu • (248) 470-9182

Croix suffered no accompanying loss in legal status. To constitute a deprivation of liberty based on the release of stigmatizing statements, a plaintiff must prove "the fact of the defamation 'plus' the violation of some more tangible interest." *Cannon v. City of Palm Beach*, 250 F.3d 1299, 1302 (11th Cir. 2001) (citing *Paul*, 424 U.S. at 701); *see also Siegert v. Gilley*, 500 U.S. 226, 233 (1991). Under the first prong of the stigma-plus test, courts examine the nature of the allegedly stigmatizing statement. *See, e.g.*, *Brown v. Simmons*, 478 F.3d 922, 923 (8th Cir. 2007) (requiring the statement to attack the "reputation, good name, honor, or integrity" of the plaintiff); *Brady v. Gebbie*, 859 F.2d 1543, 1553 (9th Cir. 1988). Courts consider whether the statement is false, and whether the statement attacks the plaintiff's honesty and morality. *Brady*, 859 F.2d at 1553 (examining the statement for accusations of dishonesty and immorality). Mere allegations of incompetence consistently fail to satisfy the "stigma" prong. *See, e.g.*, *Roley v. Pierce Cnty. Fire Prot. Dist. No. 4*, 869 F.2d 491, 495 (9th Cir. 1989) ("When delineating the scope of the liberty interest, we distinguish between a stigma of moral turpitude, which infringes a liberty interest from incompetence or inability to get along with others, which does not."); 477 *Fed. Deposit Ins. Co. v. Henderson*, 940 F.2d 465, 477 (9th Cir. 1991) (finding a charge of incompetence did not give rise to a liberty interest).

To satisfy the second prong of the stigma-plus test, the state must inhibit the plaintiff's "freedom to take advantage of other employment opportunities." *Roth*, 408 U.S. 564 at 573. Courts are unlikely to find a genuine deprivation of liberty where a plaintiff is dismissed from one position but remains free to seek other employment. *Id.* at 560. *See also Martin Marietta Materials, Inc. v. Kan. DOT*, 810 F.3d 1161, 1186 (10th Cir. 2016) (requiring additional harm beyond the loss of one subset of jobs to show violation of liberty interests); *Perry v. Fed. Bureau of Investigation*, 781 F.2d 1294, 1302 (7th Cir. 1986) ("[A] liberty interest is not implicated merely by a reduction in an individual's attractiveness to potential employers.").

1. *Dr. Croix was not defamed by Aguefort's press release*

Dr. Croix did not meet her burden in showing that Aguefort University's press release was defamatory because the release consisted only of substantiated facts and statements of opinion. The essential first element of a defamation claim is the existence of a "*false* and defamatory statement concerning another." Restatement (2d) of Torts § 558 (Am. L. Inst. 1977) (emphasis added). *See also*, *Cannon*, 250 F.3d 1299 (finding that an employee must prove that the government shared a false statement of a stigmatizing nature); *Kocher v. Larksville Borough*, 548 Fed. Appx. 813, 820 (3d Cir. 2013) (requiring a plaintiff to show that the statement was "substantially and materially false" to satisfy the stigma prong). The Court has consistently held that where an employer "creates and disseminates a false and defamatory impression about the employee in connection with his termination," a pretermination hearing or post-termination name clearing may be required. *Codd v. Velger*, 429 U.S. 624, 628 (1977) (citing *Roth*, 408 U.S. 564).

In *Codd v. Velger*, the Court held that a police commissioner did not violate the due process rights of a terminated patrolman by placing allegedly stigmatizing information in his employee file, because at no point did the patrolman dispute the veracity of the information. 429 U.S. 624. The patrolman's failure to prove—or even allege—that the commissioner's report was "substantially false" was fatal to his claim. *Id.* at 626–27. Similarly, in *Martin Marietta Materials, Inc.*, the Tenth Circuit dismissed a concrete supplier's claim of due process violations because the supplier conceded that the defendant, the Kansas Department of Transportation ("KDOT"), did not make any false statements. 810 F.3d 1161 at 1185. KDOT established stringent tests for concrete aggregate materials, which Martin

SHANNON ELIZABETH EAGEN
52 Columbia, Irvine, CA • eagens@lawnet.uci.edu • (248) 470-9182

Marietta Materials did not pass. *Id.* at 1167. The court held that disclosing the fact that Martin Marietta Materials failed these tests, in the absence of any suggestion that the company was untrustworthy or engaged in suspect business practices was neither stigmatizing nor defamatory. *Id.* at 1185.

Beyond requiring a statement to be "substantially false," the Ninth Circuit has placed particular emphasis on the *nature* of the allegedly stigmatizing statements. *Hyland v. Wonder*, 972 F.2d 1129, 1141 (9th Cir. 1992) ("The stigma imposed must be severe and genuinely debilitating before the discharge can rise to a level of constitutional concern."). Courts in the Ninth Circuit consider whether the statements in question attack a plaintiff's character for honesty and morality, rather than simply signaling incompetence or a failure to meet job expectations. *Brady*, 859 F.2d at 1553 (finding that charges of dishonesty were sufficient to implicate a liberty interest); *Synergy Project Mgmt. v. City & Cnty. of San Francisco*, 859 Fed. Appx. 99, 101 (9th Cir. 2021) (holding that calling a contractor incompetent was insufficient to establish a due process violation under the stigma-plus test). For example, in *Tibbetts v. Kulongoski*, two former government employees sued the Governor for defamation. 567 F.3d 529 (9th Cir. 2009). The Governor issued press releases stressing the need for "ethics and accountability" in the former employees' department following their dismissal. *Id.* The Governor further stated that he was advancing a "new culture" of "honesty." *Id.* at 537. The court found that these statements may have implicated the dismissed employees' liberty interests because they "impair[ed] [the employees] reputation for honesty or morality." *Id.* at 536.

Here, the University's Press Release following Dr. Croix's termination did not contain defamatory statements. The Press Release simply stated that Dr. Croix disseminated "advice inconsistent with the standards of Aguefort University." Just as the policeman in *Codd* failed to dispute the truth of the statements in his file, at no point in her complaint does Dr. Croix allege that the statements she published *were* in keeping with the medical consensus of Aguefort University. Dr. Croix's blog post challenged not only the medical community's treatment, but also CDC guidelines and federal government mandates on masking, social distancing, and quarantine. Dr. Croix promoted dangerous and unproven treatment options for COVID-19 patients, urging them to forgo treatments that were backed by CDC research. Dr. Croix openly admits that her advice was outside the medical mainstream, and she characterizes her treatment plans as "alternative."

The University's statement that Dr. Croix's opinions on COVID-19 were inconsistent with its own did not impugn her character, just as KDOT's statements in *Martin Marietta* regarding concrete quality did not defame the supplier. The University, as a public institution, has a responsibility to uphold the public health directives of the CDC and the federal government. Considering that Dr. Croix actively worked to undermine those directives on her blog, she cannot argue that the University issued materially false statements when it called her advice "inconsistent with [its] standards."

Dr. Croix argues that the statements in Alumni Letter were derogatory and implicated her competency as a medical professional. Crucially, however, these statements were expressed as the opinion of the alumni and were not touted as fact. A statement that communicates an opinion is not actionable unless the speaker implies that defamatory facts underlie that opinion. *Bundren v. Parriott*, 245 Fed. Appx. 822, 828 (10th Cir. 2007) (citing Restatement 2d. of Torts § 566). The Court previously held that "rhetorical hyperbole" and "vigorous epithet[s]" constitute opinions, rather than factual assertions. *Greenbelt*, 398 U.S. at 14. Further, a statement does not need to be prefaced by "in my opinion," or a similar phrase to be an opinion.[1]

[1] George C. Christie, *Defamatory Opinions and the Restatement (Second) of Torts*, 75 Mich. L. Rev. 1621, 1623 (1977).

SHANNON ELIZABETH EAGEN
52 Columbia, Irvine, CA • eagens@lawnet.uci.edu • (248) 470-9182

The statement that Dr. Croix's comments "were insane," is a paradigmatic example of a non-defamatory statement of opinion. Insanity is a legal term of art, bearing on the fitness of an individual to stand trial.[2] A "comment" can never be put on trial, or deemed incompetent. Therefore, it is unreasonable to conclude that the use of the word "insane" in this context was anything more than hyperbolic rhetoric. Additionally, the statements in the Alumni Letter largely focus on Dr. Croix's competence as a medical doctor, rather than her character for honesty and morality. Unlike the Governor's statements in *Tibetts*, the Press Release and the Alumni Letter address Dr. Croix's inability to meet the job expectations that have been set forth by the University. Discussions of Dr. Croix's competence do not implicate protected liberty interests. Dr. Croix may contend that the Alumni Letter attacks her moral character by implying that she shows a disregard for patient safety. Courts are wary of the government attaching a "badge of infamy" to citizens and "erroneously or impulsively damaging" their reputation. *Wisconsin v. Constantineau*, 400 U.S. 433, 436–37 (1971) (holding that respondent was entitled to due process before public posting of a notice forbidding her from buying alcohol). The statements in the letter, however, were hyperbolic opinion and not factual assertions. Accordingly, the alumni letter does not give rise to a claim of governmental defamation.

Dr. Croix is unable to satisfy the "stigma" prong of the stigma-plus test because (1) she does not dispute the veracity of the University's Press Release, and (2) the comments in the Alumni Letter were non-defamatory statements of opinion.

2. *Dr. Croix did not plead adequate facts to support a finding of altered legal status*

Even should the Court find that the statements in the press release were defamatory, "defamation, by itself, is a tort actionable under the laws of most States, but not a constitutional deprivation." *Siegert v. Gilley*, 500 U.S. 226, 233 (1991). To rise to the level of a constitutional deprivation, Dr. Croix must satisfy the "plus" prong of the stigma-plus test, by showing that she has suffered a change in legal status. *Paul*, 424 U.S. at 711–12.

Complete foreclosure of future government employment may trigger a tangible liberty interest. *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 898 (1961) (finding that exclusion from government employment may support a claim of constitutional deprivation). The loss of current employment absent any refusal to re-hire the employee, however, does not necessarily constitute an alteration in legal status. *See, e.g.*, *Paul*, 424 U.S. at 709, 711; *Roth*, 408 U.S. at 575 ("It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains free as before to seek another."). Where the government "dominates the field of opportunity," the Court is more likely to find that an employee's termination implicated her protected liberty interests. *Paul*, 424 U.S. at 704 (citing *Cafeteria Workers*, 367 U.S. at 895–96). Additionally, the Court is reluctant to find constitutional violations where an employer merely indicates dissatisfaction with the employee's work. *Bishop*, 426 U.S. at 350 ("In the absence of any claim that the public employer was motivated by a desire to curtail or penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular.").

[2] Insanity, Black's Law Dictionary (11th ed. 2019).

SHANNON ELIZABETH EAGEN
52 Columbia, Irvine, CA • eagens@lawnet.uci.edu • (248) 470-9182

To evaluate the "plus" prong of the stigma-plus test, the Ninth Circuit examines whether the plaintiff has demonstrated an inability to secure employment within her profession "as a result of her stigmatization." *Anderson v. Kane*, 152 F.3d 923 (Table), 1998 WL 416499, at *5 (9th Cir. 1998). A plaintiff is most likely to succeed where she can show that the government has effectively "blacklisted" her within her field. *Synergy*, 859 Fed. Appx. at 101. This requirement may be satisfied by alleging multiple attempts and failures to secure employment following the stigmatizing statement. *Campanelli v. Bockrath*, 100 F.3d 1476, 1480 (9th Cir. 1996) (plaintiff demonstrated he was unable to find another job in his field "despite diligent efforts," and was told multiple times that the circumstances surrounding his dismissal were a decisive factor).

Other circuits similarly require that a plaintiff must show tangible and "significant" interference with her ability to find employment to satisfy the "plus" prong. *Martin Marietta*, 810 F.3d at 1186; *see also Jensen v. Redevelopment Agency*, 998 F.2d 1550, 1559 (10th Cir. 1993) ("Damage to prospective employment opportunities is too intangible to constitute deprivation of a liberty interest."); *Perry v. Fed. Bureau of Investigation*, 781 F.2d at 1302 ("[A] liberty interest is not implicated merely by a reduction in an individual's attractiveness to potential employers."); *Allen v. Denver Pub. Sch. Bd.*, 928 F.2d 978, 982 (10th Cir. 1991) ("Only where the stigmatization results in the inability to obtain other employment does [a liberty-interest] claim rise to a constitutional level."). Courts have also declined to find a liberty interest implication where a terminated government employee remains free to find private sector work. *Martin Marietta*, 810 F.3d at 1186 (citing *Morley's Autobody, Inc. v. Hunter*, 70 F.3d 1209, 1217 n.5 (11th Cir. 1995)).

Conversely, Justice Marshall's dissent in *Siegert v. Gilley* proposed that reputational injury that leads to "loss of government employment," may on its own constitute an infringement of a liberty interest. 500 U.S. at 240 (citing *Paul*, 424 U.S. at 701). In *Siegert*, a clinical psychologist at an Army Hospital was denied government credentials after his former supervisor wrote a negative reference letter to a credentials committee. *Id.* at 227–28. Justice Marshall believed that these actions implicated Siegert's liberty interest in his reputation, because he demonstrated not only an actual attempt and failure to obtain a specific government job, but also an inability to obtain credentials, which acted as a de facto debarment from his chosen occupation. *Id.*; *see also*, *Engquist v. Or. Dep't of Agric.*, 473 F.3d 985, 997–98 (9th Cir. 2007) (requiring that a plaintiff show that it was "virtually impossible" to find employment, "as if the government had yanked the license of an individual in an occupation that requires licensure.") (quoting *Olivieri v. Rodriguez*, 122 F.3d 406, 408 (7th Cir. 1997)).

Dr. Croix's allegation that "she can no longer find work" due to the damage to her reputation is baseless. First, as the District Court identified, "the complaint is silent as to whether or not she has even tried to find another job." She does not provide any facts that would support an inference that the University has "blacklisted" her, as was the case in *Campanelli*, or that she has suffered a de facto disbarment from the medical field, as in *Siegert*. Even where Dr. Croix may struggle to find public employment, like the plaintiffs in *Martin Marietta*, she remains completely free to seek employment in the private sector.

Dr. Croix further fails to acknowledge the role that her own actions played in her purported inability to find future employment. She became the subject of extensive media coverage following her controversial blog post in which she called COVID-19 "largely an invention of the liberal media" and suggested that doctors treat COVID-19 patients with anti-malarial pills. Dr. Croix received additional negative publicity after a doctor who followed her advice was sued for wrongful death and

SHANNON ELIZABETH EAGEN
52 Columbia, Irvine, CA • eagens@lawnet.uci.edu • (248) 470-9182

medical malpractice. This viral news coverage likely generated much more attention than a press release issued by a regional medical university. Dr. Croix's inability to demonstrate that she sought and was denied employment, coupled with her failure to acknowledge the widely publicized negative statements released about her by the media as whole, severely undermine her claim that the University's actions altered her legal status.

Dr. Croix fails the stigma-plus test required for a successful governmental defamation claim because (1) the statements were not stigmatizing, and (2) she did not suffer a change in legal status.

B. Aguefort Provided Dr. Croix with Sufficient Due Process in the Course of Her Termination.

Dr. Croix received adequate due process in connection with her termination under the circumstances. To satisfy due process requirements under the Fourteenth Amendment, this Court requires "notice and an opportunity to be heard." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Fuentes v. Shevin*, 407 U.S. 67 80; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). This Court has long held that due process must be flexible and situation specific. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands.")

Courts consider three factors in assessing the requisite level of due process: (1) the private interest that may be harmed by the government action; (2) the potential for erroneous deprivation of that interest under the current procedures and the potential value of additional procedural safeguards; (3) the Government interest in minimizing administrative burden and expense. *Mathews v. Eldridge*, 427 U.S. 319 (1976). After weighing these factors, courts often modify the "formality" and the timing of the plaintiff's opportunity to be heard. *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) ("Informal procedures will suffice; in this context due process does not require a particular order of proof or mode of offering evidence."), *superseded by statute on other grounds*, Personal Responsibility and Work Opportunity Reconciliation Act, 42 U.S.C. § 601 (1996); *see also*, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (requiring "some kind of a hearing" prior to discharge) (citing *Roth*, 408 U.S. at 569).

1. *Aguefort gave Dr. Croix sufficient notice and an opportunity to be heard*

To satisfy due process in a typical termination, a government employee must be given notice of an impending hearing, an understanding of the purpose of that hearing, and an opportunity to respond. *Morrissey*, 408 U.S. at 486–87; *Goldberg*, 397 U.S. at 268. The hearing itself need not need be formal or elaborate and may be tailored to the demands of the situation at hand. *Goldberg*, 397 U.S. at 269; *Loudermill*, 470 U.S. at 545 (citing *Boddie*, 401 U.S. at 378). Similarly, courts do not have strict requirements for the form of notice, so long as it is reasonably calculated to reach the intended recipient. *Jones v. Flowers*, 547 U.S. 220, 229 (2006) (citing *Mullane*, 339 U.S. at 315). In general, this Court looks for oral or written notice of the charges against an employee and some disclosure of the evidence on which those charges are based. *Arnett v. Kennedy*, 416 U.S. 134, 140 (1974), *overruled in part on other grounds by Loudermill*. The "fundamental requisite" of this process is the provision of an opportunity to be heard prior to any deprivation. *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). This

SHANNON ELIZABETH EAGEN
52 Columbia, Irvine, CA • eagens@lawnet.uci.edu • (248) 470-9182

chance to be heard safeguards the employee against erroneous deprivation of rights. *Loudermill*, 470 U.S. at 543.

Courts thoughtfully balance these private considerations against the government's equally important interest in "quickly removing an unsatisfactory employee." *Loudermill*, 470 U.S. at 546. This balance may weigh in favor of the government where there is a "significant interest" at play. *Gilbert v. Homar*, 520 U.S. 924, 932 (1997). For example, in emergency situations, the government may be required to act expediently to avoid potential hazards. *Id.* at 931; see also *Bell v. Burson*, 402 U.S. 535, 542 (1971) (allowing for an exception to standard due process in emergency situations). This Court held, "An important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted may in limited cases demanded prompt action justify postponing the opportunity to be heard." *FDIC v. Mallen*, 486 U.S. 230, 240 (1988).

Conversely, in cases that do not involve genuine emergencies, courts have recommended suspension of an employee rather than swift termination. *Loudermill*, 470 U.S. at 545. This is not a mandate, but rather a fact-specific suggestion. *Gilbert*, 520 U.S. at 931 ("To say that when the government employer perceives a hazard in leaving the employee on the job it can avoid the problem by suspending without pay is not to say that that is the only way of avoiding the problem."). Further, the Court has acknowledged that public institutions have a heightened interest in "maintaining public confidence," particularly in situations that involve employees occupying positions of "great public trust." *Id.* at 932 (referring to the need to quickly remove police officers who were charged with felonies).

The Dean of the School of Medicine gave notice to Dr. Croix via email that she needed to speak with him about the "recent allegations" facing her. He requested that she set up a time to meet with him "ASAP," stressing that this was a "serious matter." This may not constitute a full disclosure of the charges levied against Dr. Croix, as was recommended in *Arnett*. It seems readily apparent from the context, however, that the Dean's email referred to the backlash surrounding Dr. Croix's blog post. She had recently become the subject of extensive media coverage in connection with the wrongful death suit, which caused the school to endure negative publicity, student protests, and class cancellation. This email invitation to set up a meeting provided Dr. Croix the opportunity to tell her side of the story—the "fundamental" due process requirement. *Grannis*, 234 U.S. at 394. It is no fault of the University's that Dr. Croix did not take that opportunity, instead choosing to ignore the Dean's request for more than two weeks.

The exigent circumstances surrounding Dr. Croix's dismissal justify a level of haste that excuses any deficiencies in the University's notice. The disruptions to campus life, coupled with the threat of donor withdrawal and the loss of prestige to the University, constitute precisely the type of situation in which the Court previously endorsed expedited due process. Even more pressing was the serious threat to public health and safety posed by Dr. Croix's conduct. She advocated for defiance of CDC guidelines, threatening the health of members of the campus community. Moreover, much like the police officers in *Gilbert*, Dr. Croix, as a medical professor at a prominent public university, occupies a position of great public trust. Dr. Croix may contend that the University could have chosen to suspend her prior to termination, but the Court does not require suspension in emergency situations where process must be expedited. Accordingly, the University provided Dr. Croix with sufficient notice and a chance to heard under the specific circumstances.

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52 Columbia, Irvine, CA • eagens@lawnet.uci.edu • (248) 470-9182

2. *Additional pretermination procedures would have been futile and inappropriate*

Dr. Croix has not alleged facts that demonstrate that a further hearing would have been fruitful. The purpose of a pretermination hearing is to act as an "initial check against mistaken decisions." *Loudermill*, 470 U.S. at 545. The hearing is meant to resolve factual disputes and ensure that there are sufficient grounds to support the proposed termination. *See id.* at 543; *Codd*, 429 U.S. at 627. The opportunity to be heard is "especially important" in cases where the deprivation may stem from "incorrect or misleading" facts. *Goldberg*, 397 U.S. at 268. Conversely, a lengthy pretermination process would not serve "any useful purpose" in cases where there is no room for factual debate between the employee and employer. *Codd*, 470 U.S. at 627.

The Ninth Circuit held that these fact-finding hearings are particularly important where the employee termination stems from matters outside the employer's typical purview. *Matthews v. Harney Cnty.*, 819 F.2d 889, 892 (9th Cir. 1987). The court cautioned that, absent procedural safeguards, an employee may be subject to "unforeseen termination" after participating in seemingly "unrelated matter[s]." *Id.* at 892. Accordingly, the employee must receive a "genuine opportunity to be heard." *Id.* at 893.

Dr. Croix would not have benefited from a lengthy pretermination hearing, because there was no unresolved factual dispute at the heart of her termination. The stated cause for her dismissal was her public dissemination of medical information that was not in keeping with the University's standards, and she has at no point disavowed her previous statements. This case closely resembles the circumstances contemplated by the Court in *Codd*, wherein there was no use for an extensive pretermination process, because there were no unresolved factual disputes between the parties. Here, the University's expedited process was further justified because there was no legitimate fear of wrongful termination.

Dr. Croix may suggest that she was owed additional due process because her termination stemmed from activities unrelated to her employment, as instructed by the Ninth Circuit in *Matthews v. Harney County*. Despite this assertion, her outside activities undoubtedly impacted the day-to-day performance of her job. The media frenzy and wrongful death trial caused an active disruption to the University's ability to function. Therefore, any suggestion that she was being terminated for reasons tangential to her employment ring false.

Justice Stewart once stated that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers*, 367 U.S. at 895. During the height of a global pandemic, facing pressure from alumni, students, and the media, the University was forced to act quickly to resolve this issue. Even so, the University provided Dr. Croix with an opportunity to tell her side of the story. She ignored that opportunity. Furthermore, the record as it stands reveals that any prolonged pre- or post-termination process would have been utterly futile. This is not a situation where an employer hastily terminated an employee for unsubstantiated reasons. Instead, it is an illustration of a public institution weighing its obligation to provide an employee a chance to be heard, against its own interest in maintaining a safe and productive work environment. The University properly struck that balance and gave Dr. Croix the appropriate level of due process under the circumstances.

Applicant Details

First Name	**Harold**
Last Name	**Ekeh**
Citizenship Status	**U. S. Citizen**
Email Address	**hekeh@jd24.law.harvard.edu**
Address	**Address** Street **19 East 83rd Street, Apt #1B** City **New York** State/Territory **New York** Zip **10028** Country **United States**
Contact Phone Number	**7188107683**

Applicant Education

BA/BS From	**Yale University**
Date of BA/BS	**May 2019**
JD/LLB From	**Harvard Law School** **https://hls.harvard.edu/dept/ocs/**
Date of JD/LLB	**May 20, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Harvard Civil Rights-Civil Liberties Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Bowie, Nikolas
nbowie@law.harvard.edu
617-496-0888

Waldman, Michael
barta@brennan.law.nyu.edu
646.292.8310

Gersen, Jacob
jgersen@law.harvard.edu
617-495-1414

Lee, Theresa
thlee@law.harvard.edu
(617) 496-0370

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Harold Ekeh

55 Langdon St., Cambridge, MA 02138 • hekeh@jd24.law.harvard.edu • 718.810.7683

June 12, 2023

The Honorable Beth Robinson
United States Court of Appeals, Second Circuit
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I am writing to apply for a clerkship in your chambers for the 2024–2025 term. I am a rising third-year student at Harvard Law School where I serve as Executive Managing Editor for the Harvard Civil Rights-Civil Liberties Law Review. I was raised in Queens, New York, after immigrating to the United States with my family in 2005, and I hope to return to my roots in the northeast upon graduation. I am eager to build on my experiences across procedural and substantive law to be a strong addition to your chambers.

Enclosed, please find my resume, law school transcript, and writing sample. You will receive letters of recommendation from the following references:

Nikolas Bowie
Louis D. Brandeis Professor of Law
Harvard Law School
nbowie@law.harvard.edu
617.496.0888

Jacob Gersen
Sidley Austin Professor of Law
Harvard Law School
jgersen@law.harvard.edu
617.998.1742

Theresa J. Lee
Litigation Director, Election Law Clinic
Harvard Law School
thlee@law.harvard.edu
617.496.0370

Michael Waldman
President, Brennan Center for Justice
NYU School of Law
mwaldman@brennan.law.nyu.edu
646.292.8310

I would welcome an opportunity to further discuss and would be honored to contribute my skills to the work of your chambers.

Sincerely,

Harold Ekeh

Harold Ebubechukwu Ekeh

Harold Ekeh

55 Langdon St., Cambridge, MA 02138 • hekeh@jd24.law.harvard.edu • 718.810.7683

EDUCATION

Harvard Law School | J.D. Candidate — Expected Graduation: May 2024

Honors: Dean's Scholar Prize: Local Government Law | Honors: Evidence, Torts, Framing & Supreme Court Jurisprudence. NAACP Legal Defense Fund: 2021 Justice Earl Warren Scholar, The Appellate Project, Paul & Daisy Soros Fellowship: 2021 Fellow. YaleNews | Law.com | PDSoros.

Activities: Teaching Fellow: Tort Law, Prof. Jacob Gersen | Great Supreme Court Cases, Judge Joseph Greenaway (3d Cir.)
Research Assistant: *Working Group on Supreme Court Appointments*, American Academy of Arts & Sciences
Executive Managing Editor: Harvard Civil Rights-Civil Liberties Law Review
Co-Chair: *Academic Affairs Committee*, Harvard Black Law Students Association (HBLSA)
Student Attorney: Election Law Clinic — co-author, *Moore v. Harper* amicus brief; VAEHA investigation

Yale University — **New Haven, CT**
Major: Bachelor of Arts in Political Science and Government — August 2015–May 2019
Thesis: *Campaign Finance Reform & Direct Democracy: A Comparative Assessment of State-Level Public Financing*
Selected Honors: Intel Science Talent Search: Medicine & Health Sciences Semifinalist, Prusoff Fund, RMHC Future Achievers.

PROFESSIONAL EXPERIENCE

Cravath, Swaine & Moore LLP — **New York, NY**
Summer Associate — May 2023–July 2023
- Drafting legal documents and conducting research for complex civil litigation, securities offerings, antitrust, & transportation matters.

U.S. Department of Justice, Civil Rights Division: Voting Section — **Washington, D.C.**
Heyman Fellow, Legal Intern — July 2022–August 2022
- Provided legal research & logistical support for Georgia S.B. 202 suit, drafted justification memo for forthcoming enforcement matter, conducted election monitoring to assess English-Spanish language assistance program integration under Section 203.

Skadden, Arps, Slate, Meagher & Flom LLP — **Washington, D.C.**
1L Scholar, Summer Associate — May 2022–July 2022
- Conducted legal research & drafted memos for government enforcement and white-collar defense, healthcare sciences, consumer financial services, political law, and litigation matters. Completed tax pro-bono project on incorporation of a mental health institute.

Sponsors for Educational Opportunity (SEO) Law Fellowship — **New York, NY**
Law Fellow, White & Case LLP — May 2021–July 2021
- Conducted legal research & drafted memos for antitrust and commercial litigation matters including co-conspirator jurisdiction in price-fixing schemes, pharmaceutical case analysis, and relevant class action motions to dismiss.
- Led summer associate team in drafting 90-page review brief for innocence project case; conducted legal analysis of critiques to *Richardson v. Ramirez*, 418 U.S. 24 (1974) for felony disenfranchisement matter, presented findings to client and partners.

Brennan Center for Justice at NYU School of Law — **New York, NY**
Special Assistant to the President — June 2019–May 2021
- Conducted research and provided editorial support for >15 publications, op-eds, law review articles, analyses, and reports.
- Selected Publications: *The False Narrative of Vote by Mail Fraud* | *Beyond Impeachment* | *The News' Election Day Responsibility*
  - *Trump's call to postpone elections is an outrageous break with American faith in democracy*, Washington Post
  - *It's Official: The 2020 Election was Secure* | *Voting Laws Roundup Report: March 2021*: finds 361 restrictive bills in 47 states.
- Briefed president for >80 media appearances, interviews, events, documentary tapings, board and principal-level coalition meetings.

Every Vote Counts 501(c)(3) [evcnational.org] — **New York, NY**
Co-Founder & President — Fall 2017–Present
- Spearheaded development and launch of national nonprofit to expand voter access & empower college and high school students through advocacy, engagement, and civic education; 30.2%+ Yale turnout, scaled 60+ chapters, reach>600k students, $700K budget.
- Launched TOTV, 240+ university signatories, Faculty for Student Voting Rights, recruited poll workers in 20+ states, partnered with 50+ campus groups, Yale Dean and V.P. to create Yale Votes. Press: NYT, WSJ, USA Today, Buzzfeed, RCP, The Hill, NYDN.

Congressional Black Caucus, Emerging Leaders Program — **Washington, D.C.**
Legislative Intern, Representative Gregory Meeks' (D-NY) Office — June 2017–August 2017
- Drafted legislative memos on financial services, healthcare, & voting rights; CBO procedure letter against ACA repeal (57 sponsors).

AFFILIATIONS & INTERESTS

HLS Lambda, First-Generation Law Students, Harvard African Law Students Association, Tenor: Yale Gospel Choir, Mentor: Yale African Scholars | Hiking, Strength training, Hamilton the Musical, Health & wellness podcasts, West African cuisine, Pour-over coffee

Harvard Law School

Date of Issue: June 6, 2023
Not valid unless signed and sealed
Page 1 / 2

Record of: Harold Ebubechukwu Ekeh
Current Program Status: JD Candidate
Pro Bono Requirement Complete

JD Program

Fall 2021 Term: September 01 - December 03

1000	Civil Procedure 1 Rubenstein, William	P	4
1001	Contracts 1 Okediji, Ruth	P	4
1006	First Year Legal Research and Writing 1B Havasy, Christopher	P	2
1003	Legislation and Regulation 1 Tarullo, Daniel	P	4
1004	Property 1 Mann, Bruce	P	4
	Fall 2021 Total Credits:		18

Winter 2022 Term: January 04 - January 21

1055	Introduction to Trial Advocacy Newman, Thomas	CR	3
	Winter 2022 Total Credits:		3

Spring 2022 Term: February 01 - May 13

1024	Constitutional Law 1 Eidelson, Benjamin	P	4
1002	Criminal Law 1 Yang, Crystal	P	4
1006	First Year Legal Research and Writing 1B Havasy, Christopher	P	2
2391	Progressive Alternatives: Institutional Reconstruction Now Unger, Roberto Mangabeira	H	2
1005	Torts 1 Gersen, Jacob	H	4
	Spring 2022 Total Credits:		16
	Total 2021-2022 Credits:		37

Fall 2022 Term: September 01 - December 31

3176	A Democracy Initiative Lessig, Lawrence	H	2
2000	Administrative Law Freeman, Jody	P	4
8053	Election Law Clinic Greenwood, Ruth	H	4
3005	Election Law Clinical Seminar Greenwood, Ruth	H	2
2208	Great Cases of the Supreme Court Greenaway, Joseph	CR	1
	Fall 2022 Total Credits:		13

Winter 2023 Term: January 01 - January 31

2181	Local Government Law Bowie, Nikolas * Dean's Scholar Prize	H*	2
	Winter 2023 Total Credits:		2

Spring 2023 Term: February 01 - May 31

2050	Criminal Procedure: Investigations Jain, Eisha	P	4
2079	Evidence Clary, Richard	H	3
3011	Framing, Narrative, and Supreme Court Jurisprudence Jenkins, Alan	H	2
3127	Interpreting "The Judicial Power" Gallogly, Owen	CR	1
2170	Legal Profession Seminar Wilkins, David	H	2
	Spring 2023 Total Credits:		12
	Total 2022-2023 Credits:		27

Fall 2023 Term: August 30 - December 15

3218	Debt, Discrimination, and Inequality Atkinson, Abbye	~	1
2086	Federal Courts and the Federal System Goldsmith, Jack	~	5
3202	The United States Supreme Court Sunstein, Cass	~	2
	Fall 2023 Total Credits:		8

Spring 2024 Term: January 22 - May 10

2169	Legal Profession Boak, Meredith	~	2
2195	Negotiation Workshop Heen, Sheila	~	4
8039	Veterans Law and Disability Benefits Clinic Nagin, Daniel	~	3

continued on next page

Harvard Law School

Record of: Harold Ebubechukwu Ekeh

Date of Issue: June 6, 2023
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Spring 2024 Total Credits:	9
Total 2023-2024 Credits:	17
Total JD Program Credits:	81

End of official record

HARVARD LAW SCHOOL
Office of the Registrar
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Transcript questions should be referred to the Registrar.

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In accordance with the Family Educational Rights and Privacy Act of 1974, information from this transcript may not be released to a third party without the written consent of the current or former student.

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A student is in good academic standing unless otherwise indicated.

Accreditation

Harvard Law School is accredited by the American Bar Association and has been accredited continuously since 1923.

Degrees Offered

J.D. (Juris Doctor)
LL.M. (Master of Laws)
S.J.D. (Doctor of Juridical Science)

Current Grading System

Fall 2008 – Present: Honors (H), Pass (P), Low Pass (LP), Fail (F), Withdrawn (WD), Credit (CR), Extension (EXT)

All reading groups and independent clinicals, and a few specially approved courses, are graded on a Credit/Fail basis. All work done at foreign institutions as part of the Law School's study abroad programs is reflected on the transcript on a Credit/Fail basis. Courses taken through cross-registration with other Harvard schools, MIT, or Tufts Fletcher School of Law and Diplomacy are graded using the grade scale of the visited school.

Dean's Scholar Prize (*): Awarded for extraordinary work to the top students in classes with law student enrollment of seven or more.

Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
May 2011 - Present

Summa cum laude	To a student who achieves a prescribed average as described in the Handbook of Academic Policies or to the top student in the class
Magna cum laude	Next 10% of the total class following *summa* recipient(s)
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

All graduates who are tied at the margin of a required percentage for honors will be deemed to have achieved the required percentage. Those who graduate in November or March will be granted honors to the extent that students with the same averages received honors the previous May.

Prior Grading Systems

Prior to 1969: 80 and above (A+), 77-79 (A), 74-76 (A-), 71-73 (B+), 68-70 (B), 65-67(B-), 60-64 (C), 55-59 (D), below 55 (F)

1969 to Spring 2009: A+ (8), A (7), A- (6), B+ (5), B (4), B- (3), C (2), D (1), F (0) and P (Pass) in Pass/Fail classes

Prior Ranking System and Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
Prior to 1961, Harvard Law School ranked its students on the basis of their respective averages. From 1961 through 1967, ranking was given only to those students who attained an average of 72 or better for honors purposes. Since 1967, Harvard Law School does not rank students.

1969 to June 1998	General Average
Summa cum laude	7.20 and above
Magna cum laude	5.80 to 7.199
Cum laude	4.85 to 5.799

June 1999 to May 2010
Summa cum laude General Average of 7.20 and above (exception: *summa cum laude* for Class of 2010 awarded to top 1% of class)
Magna cum laude Next 10% of the total class following *summa* recipients
Cum laude Next 30% of the total class following *summa* and *magna* recipients

Prior Degrees and Certificates
LL.B. (Bachelor of Laws) awarded prior to 1969.
The I.T.P. Certificate (not a degree) was awarded for successful completion of the one-year International Tax Program (discontinued in 2004).

June 08, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I write to recommend Harold Ekeh for a clerkship in your chambers. Harold is an inspiring person—a queer, black, first-generation American with an enormous smile and a deep commitment to democracy. He will be an excellent clerk.

I met Harold in the winter of his second year at Harvard Law School, when he enrolled in my January-term class on state and local government law. The course was an intense, three-week class that surveyed the legal structure of states and local governments along with how those structures affect discrete policies like education, housing, public safety, and public finances. As a class, we then developed a model state constitution and city charter. The two graded assignments were two essays: an 800-word essay calling for Massachusetts to amend its constitution, and a 3000-word essay calling for Cambridge to amend its charter. The essays were graded on a rubric that assessed the quality of the substantive argument as well as the quality of the writing.

Harold's essays were both excellent and a pleasure to read. In his first essay, he wrote a provocative op-ed calling upon Massachusetts to choose some members of the legislature by sortition, or lottery. Although Harold recognized that sortition-based governing bodies are unconventional in the United States, he did an enormous amount of research in a short period to support his position that lottery-based governments would address many of the problems with election-based representatives and encourage citizens to think of themselves as part of a broader community rather than a narrow voting bloc. For example, he drew on the work of one of his college mentors, the democratic theorist Hélène Landemore, to argue that elections tend to reward well-positioned insiders who conform to social preconceptions about height, race, candor, and wealth. Sortition, by contrast, would make it more likely that a governing body would include perspectives that are systematically excluded in electoral democracy: the "introverted, inarticulate, short, and shy," as well as members of groups at the bottom of social hierarchies.

Harold's second essay was a long-form Atlantic-style article that called upon Cambridge to lower the voting age to 16. Harold drew upon the experience of Greta Thunberg, Jaylen Smith, Maxwell Frost, and other national and international leaders. Where a voting age of 18 presumes that young people are not capable of making important decisions, Harold argued that these leaders demonstrated that decisions made without the perspective of young people can be far more harmful. Frost, for example, grew up among a generation of students who were required to participate in routine drills on how to respond to mass shootings—drills that could not prepare him for his own experience in Parkland, Fla. And Thunberg famously argued that young people are far more concerned about climate change than adults precisely because of their age.

Both essays shared a common theme: restructuring democracy to incorporate the values and perspectives of people who are typically excluded. This theme inspired Harold's reason for coming to law school and has guided his goal after graduating. Harold immigrated to the United States from Nigeria, and the thing that shocked him most after becoming a U.S. citizen was how many Americans are prohibited from voting. In college he founded a student-led voting organization dedicated to expanding voter access in college campuses across the country, and after graduating he spent time researching voter-exclusion laws at the Brennan Center. At HLS, Harold has dedicated most of his time studying and practicing election law. He is passionate about making the political process more democratic, fair, and accessible to all.

Although I cannot personally speak to Harold's ability to apply federal legal doctrine, I anticipate that his exceptional experience with federal voting law will translate into a successful clerkship. He certainly had no trouble grasping and applying state and local government law. In class and afterward, he had a booming laugh that filled the room with joy. I envy anyone who will get to work with him.

Sincerely,
Nikolas Bowie
Louis D. Brandeis Professor of Law
Harvard Law School

Nikolas Bowie - nbowie@law.harvard.edu - 617-496-0888

June 05, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I am delighted to write this letter offering my strongest support for Harold Ekeh's clerkship application. I have known Harold since his first year of law school when I was his professor for Torts. Most recently, I've worked closely with him as he served as a teaching fellow for this year's 1L Torts class. I have been impressed by his writing and research acumen, initiative and emotionally intelligent leadership, and unbridled dedication to service and the public interest. As a first-generation, New American, eldest of five brothers, he has persevered through—and even thrived under—a variety of challenging environments and circumstances. I am entirely confident he will be a wonderful addition to your chambers.

Harold has a unique background and wealth of experiences that ground his day-to- day work and his longer-term aspirations. He and his parents emigrated from Lagos, Nigeria to Queens, New York when he was eight years old and rebuilt their lives from the ground up. Despite various phases of transition and displacement, Harold and his family focused on educational opportunities and intentional community-building. He was the first in his family to graduate from college and has a long and demonstrated commitment to service and the public interest. He is eager to meet the moment because, as he's told me, "democracy and equality of all" is more than an idyllic intellectual exercise. He believes in the promise of this country, and it inspires his commitment to the administration of justice and service for the greater good.

Harold did his undergraduate work at Yale, studying Political Science. He is a Soros Fellow and has won a variety of awards. At Harvard Law School, he has become a valuable member of the community. I first met Harold in the Spring of 2021 as a student in my Torts class. I was impressed by his positive attitude, thoughtful and energetic in-class contributions, and his written work. He performed exceedingly well on the final exam, and I would soon learn that the high level of skill and dedication I had witnessed all semester were par for the course for Harold.

Over the summer of 2021, he kept in touch and shared his excitement working on disgorgement and damages-related matters as a 1L Scholar at Skadden's D.C. office and he plans to spend the second half of this summer doing some of the work he's been most passionate about as an intern with the Department of Justice's Civil Rights Division: Voting Section. I learned that he had built on his experiences working with the Congressional Black Caucus to launch a nationwide nonprofit dedicated to expanding voter access through advocacy and civic education on over fifty college campuses.

Reflecting what I know of his diligence and character, I asked him to be a teaching fellow for Torts this past semester. Harold was terrific with the students, with his fellow TF, and with me. He is an easy communicator, displays good judgement, and a steady hand with the students, offering support but also boundaries. Harold kept his ears to the ground and showed an almost eerie ability to always think a few steps ahead and perfectly anticipate my needs as a professor, and those of the students under his tutelage. He quickly integrated weekly office hours along with his co-teaching fellow, met with our students 1:1 for coffees and lunches, and hosted a useful review session ahead of the final examination. All of these were of his own initiative, and, throughout, he adapted quickly to inevitable curveballs and new challenges.

Overall, Harold is a pleasure to work with. I have never seen him get raddled. He displays no real ego and takes his work extremely seriously. I am confident he will make an extremely good clerk. If I can be of help in any way, please do not hesitate to ask. In the meantime, I wish you all the very best.

Sincerely,

Jacob E. Gersen
Sidley Austin Professor of Law

Jacob Gersen - jgersen@law.harvard.edu - 617-495-1414

June 2, 2023

The Honorable Beth Robinson
United States Court of Appeals for the Second Circuit
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Re: Harold Ekeh's Clerkship Application

Your Honor,

I write in unequivocal support of Harold Ekeh's application for a clerkship in your chambers. I am the Litigation Director and a Clinical Instructor at the Election Law Clinic at Harvard Law School. I was fortunate to have Harold on my team of clinical students and related seminar this past year. I supervised Harold on two case teams as well as providing one-on-one supervision throughout the course of the semester.

During my years of practice and of teaching at both Harvard and Yale Law Schools, I have worked with dozens of students, and can say that Harold is a standout in his work ethic and the depth of his legal thinking. Throughout his time in the Clinic, Harold was a key member of two case teams I managed, which allowed me to become familiar with his work in a variety of contexts.

Impressed with Harold's writing upon his admission to the Clinic, our clinical staff assigned him as one of the students charged with drafting an amicus brief highlighting the doctrinal pitfalls of the independent state legislature theory in *Moore v. Harper*. As you might imagine, work in the U.S. Supreme Court often captures the attention of law students, so there was substantial interest among our students to be assigned to that particular team. Due to the compressed timeline, as the brief was due less than two months into the semester, as well as the need for unparalleled research and writing skills, we were discriminating in assigning students to that team. Our choice of Harold proved to be just right. The brief called for substantial in-depth research across both state and federal caselaw, in addition to difficult choices about how much to include on each element of the brief in order to meet the word limit. Harold demonstrated excellent research skills, finding the exact examples the brief needed as well as undertaking research on federal jurisdiction, all before ever having taken Federal Courts. He also excelled in writing persuasively and clearly, working with his team members to structure the brief and sharpen the arguments.

While his work in *Moore v. Harper* was at the far end of the life of a litigation, in a case on final appellate review, his other case team was at the other end: developing a new idea and conducting legal and factual research in order to determine its viability. Harold was a key member of a team researching whether the under-utilized Voting Accessibility for the Elderly and Handicapped Act (VAEHA) could provide a pathway to tackle the problem of long lines at polling places. As far as our research could uncover, VAEHA has not been used as a cause of action in any case despite its inclusion of an express private right of action. Harold undertook research into the utility of VAEHA, demonstrating skill in statutory interpretation as well as the

way in which federal laws with requirements for the states are codified in state statute and regulatory regimes. This team called for creative legal thinking as well as painstaking legal and factual research about the ways in which states assign resources and voters to polling locations. In every assignment, Harold demonstrated his ability to work with his team members to identify the most efficient ways to tackle unwieldy questions as well as keen attention to detail.

As part of the seminar that accompanies the Clinic, for their semester project, the students are asked to research, develop, and propose potential litigation or legislation, and detail the legal, strategic, and community-based choices that would be necessary to pursuing such a project. For his final project, Harold developed a case making use of the under-used Section 208 of the Voting Rights Act, which considers voting access for those with disabilities. He demonstrated creative analytical thinking, proposing ways in which the law could be used to ensure the right to vote, particularly for those with so-called invisible disabilities. As with his other work throughout the semester, Harold demonstrated expansive research skills in addition to clear and precise writing, earning an H in the seminar.

Law school demands a method of thinking that is often unfamiliar for students as they begin. From working with Harold as a 2L and observing how he has grown across his law school career, it is apparent to me that while in his initial semester, he was first becoming familiar with how to think like a lawyer, he has now adapted to—and indeed excels at—the demands of legal thinking, research, and writing.

In addition to his legal skills, Harold is wonderful to work with. He is a deep thinker, gregarious, open, and kind. From my own experience as a law clerk many years ago, I can confidently say that Harold's presence would be a welcome and much valued addition to any chambers.

In sum, Harold has all the qualifications that I imagine you might be looking for in a law clerk. If you have any questions about Harold that I might be able to answer, please do not hesitate to contact me at thlee@law.harvard.edu or (617) 496-0370.

Sincerely,

Theresa J. Lee

Theresa J. Lee
Litigation Director
Election Law Clinic
Harvard Law School

Harold Ekeh

55 Langdon St., Cambridge, MA 02138 • hekeh@jd24.law.harvard.edu • 718.810.7683

Writing Sample #1

The attached writing sample is an excerpt from a brief submitted before the United States Supreme Court on behalf of *amici curiae* Carolyn Shapiro, Nicholas O. Stephanopoulos, and Daniel P. Tokaji. I worked on this as part of a three-student team in the Election Law Clinic.

Each student wrote and edited one of the three main arguments in the brief, which are outlined in the "Summary of the Argument" section. We were supervised by Theresa Lee, Litigation Director of the Election Law Clinic.

I co-wrote the "Summary of the Argument" and "Argument" section with Theresa and the two students. I solely wrote Section II (ISLT will create numerous practical problems for election administration), starting on page 6 of the attached. I redact all sections I did not take part in writing. My writing was edited by Theresa and reviewed by *amici curiae* upon the final draft. I have received permission from the clinic to use this brief as a writing sample.

1

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are law professors who research and write about election law and/or about the federal courts.

Amicus curiae Carolyn Shapiro is Professor of Law and Co-Director of the Institute on the Supreme Court of the United States at Chicago-Kent College of Law. Her related work includes *The Independent State Legislature Theory, Federal Courts, and State Law*, 90 U. Chi. L. Rev. (forthcoming 2023), and *Democracy, Federalism, and the Guarantee Clause*, 62 Ariz. L. Rev. 183 (2020).

Amicus curiae Nicholas O. Stephanopoulos is Kirkland & Ellis Professor of Law and Director of Strategy of the Election Law Clinic at Harvard Law School. His related work includes *The Sweep of the Electoral Power*, 36 Const. Comment. 1 (2021), and *Arizona and Anti-Reform*, 2015 U. Chi. Legal F. 477.

Amicus curiae Daniel P. Tokaji is the Fred W. & Vi Miller Dean and Professor of Law at the University of Wisconsin Law School.[2] His related work includes *Election Law: Cases and Materials* (7th ed. 2022) (with Richard L. Hasen, Daniel H. Lowenstein, and Nicholas O. Stephanopoulos), and *Gerrymandering and Association*, 59 Wm. & Mary L. Rev. 2159 (2018).

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[1] No parties or their counsel had any role in authoring or made any monetary contribution to fund the preparation or submission of this brief. All parties entered blanket consent for the filing of *amicus* briefs.

[2] Institutional affiliation provided for identification purposes.

SUMMARY OF THE ARGUMENT

Petitioners ask this Court to unmoor state legislatures from the very state constitutions that create them, insisting on a reading of the Elections Clause, referred to herein as the independent state legislature theory ("ISLT"). As Respondents and other *amici* show, original public meaning and practice weigh against ISLT. Because of this longstanding tradition, state law generally does not distinguish between state and federal elections. Petitioners and many *amici* focus exclusively on congressional redistricting and so fail to grapple with the implications of ISLT for the myriad other laws governing elections in this country. For these reasons, *Amici* explore the multitude of doctrinal and practical problems adoption of ISLT would likely cause in all aspects of American elections.

I. Petitioners' gloss on ISLT provides courts with no manageable standards. Petitioners propose a version of ISLT that limits the application of what they describe as "vague" constitutional provisions. But they offer no clear guidance for how to tell when a constitutional provision is so vague, such that state courts are prevented from ordinary judicial review. The best attempts of their *amici* to identify a clear statement rule are similarly opaque and would disrupt centuries of state constitutional law.

ISLT is not just a matter of the allocation of power within a state, instead it effects a massive shift from state to federal courts. It undermines the ordinary processes of judicial review and reallocates questions of state law into the federal courts, implicating

concerns key to *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), particularly forum-shopping and the inconsistent administration of state law.

II. ISLT threatens to decimate the conduct of elections across the country by effectively creating two sets of rules for administering elections and by destroying legislative delegation. ISLT could even render inoperable the very functioning of election administration systems nationwide.

III. Finally, ISLT also threatens to federalize election disputes, overburdening the federal judiciary and potentially upending approaches to state statutory interpretation without a clear replacement. And ISLT creates questions about a state legislature's ability to bind its own hands in regulating federal elections. These ambiguities risk involving the federal courts in fundamental questions of state governmental design—questions that the federal Constitution leaves to the states.

ARGUMENT

As Respondents and other *amici* show, original public meaning and practice both weigh against ISLT. So do two-and-a-half centuries of subsequent practice. As a result of this longstanding tradition, state law rarely distinguishes between state and federal elections. Indeed, "'[l]ong settled and established practice' may have 'great weight in a proper interpretation of constitutional provisions.'" *Chiafalo v. Washington*, 140 S. Ct. 2316, 2326 (2020) (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)). As the primary drafter of our Constitution recognized, "'a regular

course of practice' can 'liquidate & settle the meaning of' disputed or indeterminate 'terms & phrases.'" *Id.* (quoting *Letter of James Madison to Spencer Roan*e (Sept. 2, 1819), in 8 *Writings of James Madison* 450 (Gaillard Hunt ed., 1908)); *see also* William Baude, *Constitutional Liquidation*, 71 Stan. L. Rev. 1, 10-11 (2019). Here, *Amici* explore the multitude of doctrinal and administrative problems that ignoring these centuries of practice and adopting ISLT threaten to cause.

Adopting ISLT has the potential to disrupt both settled structures for review of election law questions and the administration of elections, throwing doctrine and the conduct of elections into disarray. While Petitioners and many of their *amici* focus exclusively on congressional redistricting, ISLT threatens to sow chaos for election-related statutes of all kinds. And their characterization of what is at issue disguises the underlying shift that ISLT effects: one from state courts to federal courts. By abrogating the power of state courts to review state law regulation of federal elections, ISLT will likely force more cases into federal courts. A system where federal courts interpret and create a separate body of law for federal elections will have states running two sets of elections despite having a single statute. ISLT could also hobble the decentralized way that states conduct elections, creating confusion for voters and imposing crippling administrative burdens on legislatures. And it would create uncertainty about which law applies by throwing past executive or judicial action into question. ISLT spells confusion and disarray for

federal courts, state governments, and voters across the country.

This is true no matter what version of ISLT is considered. At the most basic level, proponents of ISLT argue that the Elections Clause's reference to the "Legislature" restricts the power to regulate federal elections *only* to the state's legislative body, "rather than the state as an entity." Michael T. Morley, *The Independent State Legislature Doctrine*, 90 Fordham L. Rev. 501, 503 (2021) (Morley, *ISLD*). In this view, the other branches of state government are deprived of their ordinary power to check the state legislature's regulation of federal elections.

All forms of ISLT raise varying questions about constitutional structure and historical support. *See Hearing on "The Independent State Legislature Theory and its Potential to Disrupt our Democracy" Before the H. Comm. on Administration*, 117th Cong. 1 (2022) (testimony of Richard H. Pildes, Sudler Family Professor of Constitutional Law). While Petitioners advance a maximalist version that objects to the North Carolina Supreme Court's exercise of legislatively authorized power, any version of ISLT will likely produce doctrinal and administrative problems, disrupting both the way states run elections and how courts adjudicate disputes.

I. ISLT undermines the normal operation of judicial review.

[REDACTED]

II. ISLT will create numerous practical problems for election administration.

A. ISLT may disrupt the legislative delegation of administrative decisions and the conduct of elections.

1. Any version of ISLT threatens to disrupt the way states across the country conduct elections, and the version that Petitioners advance appears to prohibit any assignment of elections-related authority to nonlegislative bodies.

North Carolina's legislature expressly assigned review to North Carolina's courts. *See* N.C. Gen. Stat. §§ 1-267.1(a), 120-2.3, 120-2.4(a1). Petitioners attempt to mask the extreme result of their argument as a mere objection to the way in which judicial review functioned, *see* Pet. Br. 1, 48, but any fair reading of the related statutes and procedural history of the case belies this contention. The statute places review in the hands of the North Carolina courts, expressly affording them jurisdiction over a specific area of law, i.e., districting. There is no clear line between assignment of judicial review and delegation of authority to nonlegislative actors to regulate elections. Thus, if this Court embraces Petitioners' version of ISLT, it opens the door to myriad challenges to states' structures of election governance. *See* Shapiro, *supra* (manuscript at 55).

2. This view of ISLT thus has the potential to create chaos in election administration. Election administration is a "decentralized" process, "primarily administered by thousands of state and local systems

rather than a single, unified national system." Karen L. Shanton, Cong. Rsch. Serv., R45549, *The State and Local Role in Election Administration* 1 (2019). Nonlegislative actors make crucial decisions for the regulation and administration of elections. Florida's state legislature has delegated creation and maintenance of voter registration to the Secretary of State. Fla. Stat. § 98.035(1). In Georgia, the legislature has delegated the ability to select and fix polling place precincts to county officials. Ga. Code Ann. § 21-2-265(a). North Carolina's General Assembly has created a State Board of Elections with the power of general supervision and the authority to regulate elections. N.C. Gen. Stat. § 163-22(a). In Ohio, the legislature has delegated to the Secretary of State the power to appoint the Board of Electors, which in turn exercises the delegated power to carry out a variety of duties related to the conduct of elections. Ohio Rev. Code Ann. §§ 3501.05, 3501.011. These are but a small sampling of the myriad delegations of authority embedded in the operation of American elections.

ISLT would, at a minimum, invite new and widespread challenges to longstanding election systems. Ultimately, it could undermine the delegation of authority those systems depend on. State legislatures, suddenly independent and unable to delegate, could be forced to make hundreds of miniscule decisions related to election administration. Legislators would be forced to choose between continuing their normal legislative business or spending months administering elections. This situation is unworkable and is unnecessary as a matter of constitutional interpretation.

B. ISLT will likely lead to many states having two different sets of rules for state and federal elections, confusing voters and burdening election administrators.

1. Most state election laws apply to state and federal elections without distinction. *See* Shapiro, *supra* at 6-7. And despite Petitioners' focus on congressional districting, their theory reaches all manner of election laws. Under ISLT, if a state court finds an election statute unconstitutional under the state constitution, the statute would remain in force for federal elections, leading to two different sets of election rules. This would cause administrative burdens and chaos by forcing election administrators to run concurrent state and federal elections under different rules.

For instance, the Delaware Supreme Court recently determined that new statutory provisions authorizing vote-by-mail and same-day voter registration violated the state constitution. *Albence v. Higgin*, No. 342, 2022 WL 5333790, at *1 (Del. Oct. 7, 2022). ISLT would require election administrators to keep vote-by-mail and same-day voter registration systems in place for federal, but not state, elections. Such an outcome would lead to administrative chaos as the Board of Elections would have to permit same-day-registration and send mail ballots to voters for federal races alone. Administering separate registration deadlines and vote-by-mail schemes would burden election administrators and sow confusion among voters.

Think also of Arkansas's Act 595, a law designed to implement a photo voter ID mandate, which was

struck down as violating the state constitution by imposing an additional qualification on voting that would make it harder for Arkansas voters to exercise the franchise. *Martin v. Kohls*, 44 S.W.3d 844, 852-53 (Ark. 2014). Arkansas election officials are prohibited from enforcing the voter ID mandate for state elections. But ISLT would nevertheless require the state to keep Act 595's requirements in force for federal elections. This dual system would require additional staff training and costly duplicative administrative investment, while creating confusion for voters and election officials alike.[3]

As courts routinely consider the constitutionality and meaning of election laws, it is not difficult to foresee other instances where the conduct of state and federal elections under different rules would lead to an administrative morass, difficulties for election workers, and confused and frustrated voters. For instance, in most states, the hours that the polls are open are set by statute, but a problem with a particular polling place opening late can lead to a court order extending the hours of that polling location.[4] If a state court

[3] Occasionally, states choose to have a dual system, with different requirements for state and federal elections. *See* Ariz. Rev. Stat. § 16-121.01. But in those situations, the decision is made by the legislature, not by the interaction of judicial review with the esoteric ISLT. Moreover, the legislature can provide time (and funding) for election administrators to prepare. Dual systems created as a byproduct of state judicial review would not have those features.

[4] Others have suggested that state courts, rather than having their review constrained, simply lack the power to draw remedial maps. *See* William Baude & Michael W. McConnell, *SCOTUS*

issued such an order on state constitutional grounds, ISLT appears to require that voters casting ballots after the statutory closing time would only be allowed to vote for state and local offices. This would be virtually impossible for poll workers to administer, as ballots contain all of the contested offices in an election, and doubtlessly lead to voter confusion and upset.

2. Such a two-tiered election system leads to even more disarray when considered against the federal constitutional requirement that electors for the House and Senate have the same qualifications as those for state houses. U.S. Const., art. I, § 2, cl. 1; U.S. Const. amend. XVII, § 1. Under these clauses, voters for state legislature are also eligible to vote for members of Congress. *See* The Federalist No. 57, at 349 (James Madison) (Clinton Rossiter ed., 2003) ("The electors . . . are to be the same who exercise the right in every State of electing the corresponding branch of the legislature of the State.").

Under ISLT, if a state court finds an election statute governing voter qualifications unconstitutional under the state constitution, at first blush, the provision would appear to still be in force for all federal

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Must Reject the Independent-State-Legislature Doctrine, The Atlantic (Oct. 11, 2022). While acknowledging state courts power to interpret and apply their constitutions and to issue prohibitory injunctions, this position again misses the broader impacts of ISLT beyond districting and is inconsistent with the remedial power of courts. Extensions of polling hours, just like the entry of remedial maps in districting cases, are forms of relief "'fashioned in the light of well-known principles of equity.'" *North Carolina v. Covington*, 137 S. Ct. 1624, 1625 (2017) (quoting *Reynolds v. Sims*, 377 U.S. 533, 585 (1964)).

elections. But courts would then have to determine whether the federal Constitution also demands that voters eligible to vote in the state legislative election be able to vote in congressional elections as well.

For instance, in Maryland, the state supreme court struck down a statutory scheme that created a list of inactive voters and allowed for their removal from the voter registration rolls as creating an additional qualification to vote in violation of the Maryland Constitution. *Md. Green Party v. Md. Bd. of Elections*, 832 A.2d 214, 229 (Md. 2003). Voters could not be made inactive for state elections, but with ISLT, at first glance, would be for federal elections. But the federal Qualifications Clauses add an extra wrinkle to this two-tiered system. It is unclear how this list maintenance system would operate for U.S. House and Senate elections. For those elections, would the eligible voters be the same as those for state elections, where infrequent voters remain registered, or would it match presidential elections, where, under ISLT, such voters would be removed? *See* U.S. Const., art. II, § 1, cl. 3. Indeed, courts and litigants would be forced to assess whether state court decisions on contested election provisions affect voter qualifications as envisioned in Article I and the 17th Amendment to begin with, before attempting to sort whether congressional elector qualifications must align with those for the state legislature.

C. ISLT will likely create confusion about which laws apply, further contributing to chaos.

1. ISLT may also create confusion about which laws apply by throwing into question the scope of past decisions of state courts. Where a state court has previously enjoined an election law, ISLT creates a question as to which rules govern federal elections. *See* Shapiro, *supra* (manuscript at 52); Maureen E. Brady, *Zombie State Constitutional Provisions*, 2021 Wisc. L. Rev. 1063, 1081-82.

Take Missouri, for example. In 2006, the Missouri Supreme Court struck down a voter ID law, SB 1014, on the ground that it "impose[d] a severe burden" on the "fundamental right to vote" protected by the state constitution. *Weinschenk v. State*, 203 S.W.3d 201, 213, 217 (Mo. 2006) (en banc) (per curiam). In 2016, the Missouri legislature enacted a new voter ID law. *See* Mo. Rev. Stat. § 115.427 (2016). The Supreme Court of Missouri permanently blocked a central portion of the 2016 law in October 2020 because it required a "misleading" and "contradictory" sworn statement from people lacking a photo ID. *Priorities USA v. State*, 591 S.W.3d 448, 452 (Mo. 2020) (en banc). And in September 2022, Missouri passed HB 1878, a new law requiring voters to use a government-issued photo ID to vote. *See* Mo. Rev. Stat § 115.427 (2022). Under ISLT, both the enjoined 2006 law and the permanently blocked affidavit requirement of the 2016 law would arguably still be in effect for federal elections, creating confusion about which of these

three versions of § 115.427 governs voter ID and affidavit requirements.

Missouri's SB 1014 is already more than fifteen years old. The same retroactive application ISLT appears to demand would arguably apply to much older legislative enactments, state court rulings, and gubernatorial vetoes. Piecing together the alternate history ISLT demands would prove difficult for state officials, election administrators, voters, litigants, and the federal courts, underscoring the importance of long-standing practice to constitutional meaning. *See Chiafalo*, 140 S. Ct. at 2326.

In cases where state supreme courts have used the constitutional avoidance canon in interpreting election laws to avoid striking them down under the state constitution, the retroactive application ISLT likely demands may become even more confusing. In Alaska, for example, the state supreme court employed a saving construction to keep a ballot-counting statute in line with the state constitution. Applying a long-standing Alaskan interpretive principle, the court read the law to not invalidate ballots where voters made small errors or variations when voting for write-in candidates. *Miller v. Treadwell*, 245 P.3d 867, 868-69 (Alaska 2010). Under ISLT, the most literal reading of the statute might well take precedence over any saving constructions applied by the Alaska state court, leading to the invalidation of votes for minor errors. The retroactive application of ISLT threatens to create confusion for voters and state officials alike about what law applies after previously enjoined or interpreted laws are resuscitated. Indeed, it calls into question

longstanding state law precedent, like that discussed in *Miller*. *Id.* at 869 & n.14 (relying on case law establishing that Alaska courts are "reluctant to permit a wholesale disfranchisement of qualified electors through no fault of their own, and '[w]here any reasonable construction of the statute can be found which will avoid such a result, [we] should and will favor it'").

2. Taken to its logical conclusion, ISLT could also create confusion about what law applies in the context of previously vetoed laws.[5] In New Jersey, for example, Governor Christie vetoed a 2013 law expanding early voting. New Jersey has since passed different

[5] Though this Court has upheld the role of governors in the enactment of election related legislation, *see Smiley v. Holm*, 285 U.S. 355, 368 (1932), it is unclear that this holding would be undisturbed if the Court now adopts ISLT, see Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 Ga. L. Rev. 1, 90 (2020) (admitting that ISLT could "require overturning . . . Smiley"). Indeed, at both the federal level and in every state, our government is one of tripartite and coequal branches. *See, e.g., United States v. Nixon*, 418 U.S. 683, 707 (1974) ("In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence."); *Bush v. Schiavo*, 885 So. 2d 321, 330 (Fla. 2004) ("Under the express separation of powers provision in our state constitution, 'the judiciary is a coequal branch of the Florida government vested with the sole authority to exercise the judicial power.'" (quoting *Chiles v. Children A, B, C, D, E, & F*, 589 So.2d 260, 268 (1991))). In fact, the Framers agreed that separation of powers was essential for a republican form of government, which the Constitution expressly guarantees at the state level. U.S. Const., art. IV, § 4; William M. Wiecek, *The Guarantee Clause of the U.S. Constitution* 68 (1972).

regulations of early voting, as recently as 2022. If Governor Christie's veto does not stand, then does the 2013 law apply to federal elections? Or do both the 2013 and 2022 laws apply to those elections?

III. ISLT could lead to federal courts disrupting ordinary state statutory interpretation doctrines and practices.

[REDACTED]

* * * *

Adopting ISLT creates chaos, upending longstanding practices of election administration and constitutional design. It may render inoperable the very functioning of our election systems and threatens to disrupt settled expectations of the relationship between federal and state sovereignty.

CONCLUSION

This Court should reject Petitioners' attempt to upend more than 200 years of practice and governmental design.

October 26, 2022

Respectfully submitted,

THERESA J. LEE
Counsel of Record
RUTH GREENWOOD
HARVARD LAW SCHOOL
ELECTION LAW CLINIC
6 Everett Street, Suite 4105

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Cambridge, MA 02138
(617) 496-0222
thlee@law.harvard.edu

Counsel for Amici Curiae

Harold Ekeh

55 Langdon St., Cambridge, MA 02138 • hekeh@jd24.law.harvard.edu • 718.810.7683

Writing Sample #2

As a summer associate at Skadden, Arps, Slate, Meagher & Flom LLP, I prepared the attached memorandum for a partner in the litigation department. The memorandum examined the disposition of *Liu v. SEC*, 140 S.Ct. 1936 (2020), following its remand to the U.S. District Court for the Central District of California.

The memorandum also details the amount the District Court ordered to be disgorged, how the court calculated the disgorgement award, and whether the court addressed the practice of depositing a defendant's gains with the U.S. Treasury. I received one round of stylistic edits from an associate.

To preserve client confidentiality, some portions have been redacted. I have received permission from Skadden to use this memorandum as a writing sample.

PRIVILEGED AND CONFIDENTIAL
SUBJECT TO THE ATTORNEY-CLIENT
AND ATTORNEY WORK PRODUCT PRIVILEGES

M E M O R A N D U M

June 1, 2022

TO: [REDACTED]

FROM: Harold Ekeh

RE: Disgorgement in *Liu* Remand Proceedings

The purpose of this memorandum is to summarize the disposition of *Liu v. SEC*, 140 S.Ct. 1936 (2020), following its remand to the U.S. District Court for the Central District of California. The memorandum also details the amount the District Court ordered to be disgorged, how the court calculated the disgorgement award, and whether the court addressed the practice of depositing a defendant's gains with the U.S. Treasury.

I. Disposition Upon Remand and Disgorgement Award[1]

The District Court ordered defendants Charles C. Liu and Xin Wang to disgorge, jointly and severally, $20,871,758.81. This award represented net profits gained as a result of the conduct alleged in the U.S. Securities and Exchange Commission's ("SEC") complaint, together with prejudgment interest thereon in the amount of $70,713.06.[2] The court ordered the defendants to satisfy their obligations by transmitting payment to the SEC within 30 days of entry of the final judgement. The court calculated the disgorgement award by subtracting the following amounts from the $26,423,168 that Liu and Wang raised from investors:

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1 Order Granting SEC's Motion for Disgorgement Against Defendants Charles C. Liu and Xin Wang [Dkt. 319], *SEC v. Liu*, No. 8:16-cv-00974, June 7, 2021 (C.D. Cal. 2021).

2 The court held Liu further liable for a civil penalty in the amount of $6,714,580 and Wang further liable for a civil penalty in the amount of $1,538,000, pursuant to Section 20(d)(2)(C) of the Securities Act.

Defendants were also permanently restrained and enjoined from (1) violating Section 17(a) of the Securities Act in the offer or sale of any security by the use of any means or instruments of transportation or communication in interstate commerce and (2) directly or indirectly participating in the offer or sale of any security which constitutes an investment in a "commercial enterprise" under the EB-5 visa program administered by the USCIS.

- $2,210,701 in administrative expenses;
- $3,105,809 in legitimate business expenses; and
- $234,899.19 remaining in defendants' corporate accounts plus prejudgment interest.

II. Whether the District Court Directed Proceeds to the Treasury

The final judgement does not address whether proceeds were to be deposited with the Treasury. The judgement does specify, however, that the SEC "shall hold the funds together with any interest and income earned thereon (the 'Fund') pending further order of the Court."[3] Additionally, the order notes that the SEC may propose a plan to distribute the Fund subject to the court's approval. Any such plan may provide that the Fund shall be distributed pursuant to the Fair Funds provision of Section 308(a) of the Sarbanes-Oxley Act of 2002. This provision returns wrongful profits, penalties, and fines to defrauded investors.

III. Calculation of the disgorgement award[4]

A. Legitimate Expenses

The Supreme Court provided some guidance on what constituted legitimate expenses in the *Liu* case: "some expenses from [Liu and Wang's] scheme went toward lease payments and cancer-treatment equipment," and "[s]uch items arguably have value independent of fueling a fraudulent scheme." *Liu*, 140 S.Ct. at 1950. However, the Supreme Court explicitly left open the question of "whether including those expenses in a profit-based remedy is consistent with the equitable principles underlying § 78u(d)(5)." *Id.*

On remand, the government and defendants both relied heavily on numbers from bookkeeping performed by Marcum LLP, the accountant to the defendants' business venture.[5] Because of the unreliability of Marcum LLP's bookkeeping, however, the District Court chose to take a "very liberal approach" to determining what expenses were legitimate.

1. <u>$45,000 in Administrative Fees from Each Investor</u>

The private offering memorandum ("POM") solicited $545,000 from each investor. That investment was divided into two types of payment: (1) a $500,000 capital contribution and (2) $45,000 in administrative fees. Defendants collected a total of $2,210,701 in administrative fees from their investors. Because the amount spent on activities for which the POM stated

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[3] Final Judgement as to Defendant Charles C. Liu and Xin a/k/a/ Lisa Wang, *SEC v. Liu*, No. 8:16-cv-00974, June 14, 2021, (C.D. Cal. 2021).

[4] Order Granting SEC's Motion for Disgorgement Against Defendants Charles C. Liu and Xin Wang [Dkt. 319], *SEC v. Liu*, No. 8:16-cv-00974, June 7, 2021, (C.D. Cal. 2021).

[5] Marcum LLP, the corporate defendant's accountant, disclaimed the reliability of its numbers for anything resembling an audit. Marcum stated that its services would be performed based on dates and information that Liu provided, which would not be verified or audited. This left the District Court with "a general ledger prepared primarily on the say-so of an adjudicated fraudster, which the preparing accountant expressly stated could not be relied upon to detect errors or fraud."

administrative fees may be used far exceeded the amount raised for such activities, the SEC suggested that the entirety of administrative fees collected may be deducted as legitimate expenses.

The District Court had serious concerns as to whether money spent on administrative fees was indeed legitimate.[6] However, "out of an abundance of caution," and "lacking any way to know whether any administrative fee expenses were legitimate," the court deducted the full $2,210,701 amount the SEC suggested – the total amount of administrative fees raised – as legitimate expenses.

2. Expenses for Development of a Proton Therapy Center

The SEC proposed that the District Court deduct $3,105,809 in expenses related to construction of the proton therapy center—including construction, rent, equipment, tax payments, insurance costs, travel, consulting fees, and permit and license fees.[7] The court considered the SEC's proposal "extremely generous" to Liu and Wang for three reasons:

- The calculation relied heavily on Marcum's bookkeeping;
- Any construction done at the site of the proton therapy center seemed to the Court to be part of the fraud and not a legitimate business expense; and
- It was "difficult to consider money spent to rent land on which defendants never actually planned to operate a proton therapy center as a legitimate expense."

Out of "an abundance of caution," and "in light of the Supreme Court's admonitions," the District Court proceeded to deduct the proposed amount.

B. Non-Legitimate Expenses

Defendants argued that Liu's $3 million payment to Mevion for a proton therapy machine was also a legitimate expense that should be deducted. The Court concluded that the purpose of the Mevion payment was not to secure a proton therapy machine because Liu already had such a machine with another company, Optivus. The purpose, instead, was "to cut Dr. Thropay out of the project so that Liu could get away with his fraud and make more money."

Because the POM did not contemplate Liu or Wang receiving any salary at all (it contemplated a management fee – with Pacific Proton Regional Center named as the manager, not Liu or Wang), the Court decided that the $7.57 million in compensation for Liu and Wang was not a legitimate expense.

C. Defendants' Argument That There Were No Net Profits

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[6] For example, UDG—the marketing company Liu paid over $3.8 million—had deep connections to Liu and Wang, with Liu even referring to UDG as "my wife's company." *Liu*, 262 F. Supp. 3d at 964.

[7] The SEC's proposed deduction includes (1) construction-related costs such as architectural design fees, (2) rent payments to Dr. Thropay, (3) proton equipment purchases provided for in the POM and other capital expenditures, and (4) operating expenses such as insurance costs, travel to China and Singapore to recruit patients, consulting fees, permit and license fees, and taxes, among others.

Defendants argued that "there are no net profits to award as equitable disgorgement" because "the project companies incurred significant losses" of about $16.5 million. The Court replied, "Nonsense." Citing *SEC v. Shaoulian*, the court observed: "Expenditures a defendant makes for his or her own use from illegally obtained funds are counted against the defendant, precisely because he or she benefited from those expenditures." *S.E.C. v. Shaoulian*, 2003 WL 26085847, at *6 (C.D. Cal. May 12, 2003).

Against defendants' protestation that they did not indirectly receive some of the funds (i.e., some of the funds were paid to companies that had no connection to defendants), the court held that "Liu and Wang must be held accountable, and not given any deduction in the disgorgement award, for the monies that they paid to independent companies to perpetrate their fraud." The court based its conclusion on the fact that defendants' construction would "permit the perpetrator of a successful scheme, who was just as successful at dissipating the ill-gotten gains, to avoid a disgorgement order because at the time of the order, [they] had retained none of the proceeds from the scheme."

IV. Does the practice of depositing a defendant's gains with the Treasury satisfy §78u(d)(5)'s command that any remedy be "appropriate or necessary for the benefit of investors"?

The Supreme Court in *Liu* left to the District Court the question of whether, and to what extent, the practice of depositing disgorgement funds with the Treasury satisfies the SEC's obligation to award relief "for the benefit of investors" and the limitations of 15 U.S.C. §78u(d)(5).

The Supreme Court emphasized, however, that the parties "do not identify a specific order in this case directing any proceeds to the Treasury." "If one is entered on remand, the lower courts may evaluate in the first instance whether that order would be for the benefit of investors and consistent with equitable principles." *Liu*, 140 S.Ct. at 1947-1949.

Because the District Court did not enter such an order directing proceeds to the Treasury, the court does not address the aforementioned question in any of its remand proceedings.

Applicant Details

First Name	**Katherine**
Middle Initial	**M**
Last Name	**Fleming**
Citizenship Status	**U. S. Citizen**
Email Address	**kfleming@jd24.law.harvard.edu**
Address	**Address** Street **15 Everett Street** City **Cambridge** State/Territory **Massachusetts** Zip **02138** Country **United States**
Contact Phone Number	**6179906363**

Applicant Education

BA/BS From	**Princeton University**
Date of BA/BS	**June 2019**
JD/LLB From	**Harvard Law School** **https://hls.harvard.edu/dept/ocs/**
Date of JD/LLB	**May 24, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Harvard Journal of Law & Gender**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Suk-Gersen, Jeannie
jsg@law.harvard.edu
617-496-8834

Roth, Emma
emma.r@pregnancyjusticeus.org
347-502-6785

Chen, Alexander
achen@law.harvard.edu
6173902656

This applicant has certified that all data entered in this profile and any application documents are true and correct.

KATHERINE MCCLAIN FLEMING
15 Everett Street, Apt. 45, Cambridge, MA 02138 ■ kfleming@jd24.law.harvard.edu ■ 617-990-6363

June 12, 2023

The Honorable Beth Robinson
United States Court of Appeals, Second Circuit
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I write to apply for a clerkship in your chambers for the 2024-2025 term. I am a rising third-year student at Harvard Law School. I wish to clerk because I have a deep commitment to procedural fairness, equal justice, and public service. As a public interest student with a focus on LGBTQ+ advocacy, I am especially interested in a clerkship in your chambers given your advocacy for civil unions and marriage equality.

Enclosed are my resume, law school and undergraduate transcripts, writing sample, and letters of recommendation from the following people:

- Professor Jeannie Suk Gersen, jsg@law.harvard.edu, 617-390-2656
- Professor Alexander Chen, achen@law.harvard.edu, 347-502-6785
- Emma Roth, Staff Attorney, emma.r@pregnancyjusticeus.org, 347-502-6785

From my two years in legal aid, I have experience managing a busy docket, working closely with judges and clerks, and navigating courtrooms. At my internship last summer with Pregnancy Justice, I reviewed over five hundred laws and cases and condensed my findings and analysis into a published issue brief. This summer, as a litigation intern at Planned Parenthood, I am immersed in analyzing complex procedural questions as well as innovative state constitutional claims. As a research assistant for Professor Jeannie Suk Gersen, I survey legal commentary, cases, and news on cutting-edge issues of reproductive rights and law and assist in discovery, including document review. My work as a technical editor on the *Harvard Journal of Law and Gender* has sharpened my eye for detail. It would be an honor to apply this experience in your chambers.

I would be happy to provide any additional information. Thank you for your consideration.

Sincerely,

Katherine McClain Fleming

Enclosures

KATHERINE MCCLAIN FLEMING

15 Everett St., Apt. 45, Cambridge, MA 02138 ■ 617-990-6363 ■ kfleming@jd24.law.harvard.edu

EDUCATION

Harvard Law School, Cambridge, MA
J.D. Candidate Expected May 2024
Honors: Dean's Scholar Prizes in Constitutional Law, Torts, LGBTQ+ Advocacy Clinic, Employment Law, and Reproductive Rights and Justice
James Vorenberg Equal Justice Summer Fellowship
Activities: *Harvard Journal of Law and Gender*, Senior Executive Technical Editor and Selections Editor
Women's Law Association, Queer Women's Coalition Leader
Alliance for Reproductive Justice, Clinical Proposal Team Lead

Princeton University, Princeton, NJ
B.A., summa cum laude in History; Certificate in Gender and Sexuality Studies June 2019
Thesis: *Borders, Bridges, and Burdens: Latinas Navigate* Our Bodies, Ourselves, *1969-Present*
Honors: Phi Beta Kappa, Early Induction (top 2% of senior class)
Laurence S. Hutton Prize in History (awarded to top graduate in History Department)
Activities: Princeton Students for Gender Equality, Co-Founder and President

EXPERIENCE

Planned Parenthood Federation of America, New York, NY May–July 2023
Litigation Intern. Conduct legal research and analysis; draft memoranda, pleadings, affidavits, and briefs; assist in factual development for ongoing and developing state constitutional litigation; and communicate with clients.

Gender Justice, St. Paul, Minnesota July–August 2023
Legal Intern. Work on impact litigation advancing LGBTQ+ rights, reproductive justice, and anti-discrimination.

Professor Jeannie Suk Gersen, Harvard Law School Fall 2022–present
Research Assistant. Write research memos on cutting-edge legal issues related to pregnancy and abortion, including fetal personhood, disability, and religious liberty. Assist in discovery, including document review.

LGBTQ+ Advocacy Clinic, Harvard Law School Fall 2022
Student Attorney. Completed white paper on Veterans Affairs benefits for LGBTQ+ spouses. Worked on transgender rights advocacy, including memos on medical guidelines, standing, and ADA gender dysphoria claims.

Pregnancy Justice (formerly National Advocates for Pregnant Women), New York, NY Summer 2022
Legal Intern. Conducted state-by-state research on fetal personhood statutes and case law and condensed findings into published issue brief, "When Fetuses Gain Personhood," quoted in *New York Times*, *Washington Post*, *Huffington Post*, and *CBS News*. Prepared memo compiling and assessing the relative strength of different constitutional arguments for reproductive rights. Provided research assistance for state habeas corpus petition.

Chicago Volunteer Legal Services, Chicago, IL 2019–2021
Child Representative and Minor GAL Program Coordinator; Princeton AlumniCorps Public Interest Fellow.
Coordinated pro bono representation for children in civil court. Managed docket of four hundred cases. Worked closely with judges and clerks on court appointment programs and pro se litigant help desk. Assisted in clinics helping undocumented parents execute guardianship plans. Served as paralegal on family law cases.

Professor Desmond Jagmohan, Princeton University 2017–2019
Research Assistant. Did extensive research on Black political history and Native American residential schools, including in archives at Hampton University and Tuskegee University. Copy-edited and cite-checked manuscripts.

Signs: Journal of Women in Culture and Society, Boston, MA Summer 2017
Editorial Intern. Edited manuscripts and assisted with peer review for feminist academic journal.

PERSONAL

Proficient in Spanish. Enjoy art and art history, museums, poetry, running, and vegan baking.

Harvard Law School

Date of Issue: June 2, 2023
Not valid unless signed and sealed
Page 1 / 2

Record of: Katherine McClain Fleming
Current Program Status: JD Candidate
Pro Bono Requirement Complete

JD Program

Fall 2021 Term: September 01 - December 03

1000	Civil Procedure 7 Charles, Guy-Uriel	P	4
1002	Criminal Law 7 Kamali, Elizabeth Papp	P	4
1006	First Year Legal Research and Writing 7B Elinson, Gregory	H	2
1003	Legislation and Regulation 7 Rakoff, Todd	P	4
1004	Property 7 Smith, Henry	H	4

Fall 2021 Total Credits: 18

Winter 2022 Term: January 04 - January 21

1052	Lawyering for Justice in the United States Gregory, Michael	CR	2

Winter 2022 Total Credits: 2

Spring 2022 Term: February 01 - May 13

1024	Constitutional Law 7 Gersen, Jeannie Suk * Dean's Scholar Prize	H*	4
1001	Contracts 7 Coates, John	H	4
1006	First Year Legal Research and Writing 7B Procaccini, Francesca	P	2
2596	Legal History Workshop: Intimacy and the Law Lvovsky, Anna	H	2
1005	Torts 7 Sargentich, Lewis * Dean's Scholar Prize	H*	4

Spring 2022 Total Credits: 16
Total 2021-2022 Credits: 36

Fall 2022 Term: September 01 - December 31

3183	Comparative and International Legal Struggles Over Sexual and Reproductive Health and Rights Yamin, Alicia	CR	1
2035	Constitutional Law: First Amendment Fallon, Richard	H	4
2467	Gender Identity, Sexual Orientation, and the Law Chen, Alexander	H	3
8054	LGBTQ+ Advocacy Clinic Chen, Alexander * Dean's Scholar Prize	H*	5

Fall 2022 Total Credits: 13

Winter 2023 Term: January 01 - January 31

2050	Criminal Procedure: Investigations Whiting, Alex	P	3

Winter 2023 Total Credits: 3

Spring 2023 Term: February 01 - May 31

3094	Climate Change and the Politics of International Law Orford, Anne	H	3
2069	Employment Law Block, Sharon * Dean's Scholar Prize	H*	4
7000W	Independent Writing Gersen, Jeannie Suk	H	3
2540	Reproductive Rights and Justice Goodwin, Michele * Dean's Scholar Prize	H*	3

Spring 2023 Total Credits: 13
Total 2022-2023 Credits: 29

Fall 2023 Term: August 30 - December 15

2079	Evidence Clary, Richard	~	3
2169	Legal Profession: Collaborative Law Hoffman, David	~	3
3241	Privacy Law Nielsen, Aileen	~	4
3108	The Supreme Court as a Lawmaking Institution Fallon, Richard	~	2

Fall 2023 Total Credits: 12

continued on next page

Assistant Dean and Registrar

Harvard Law School

Record of: Katherine McClain Fleming

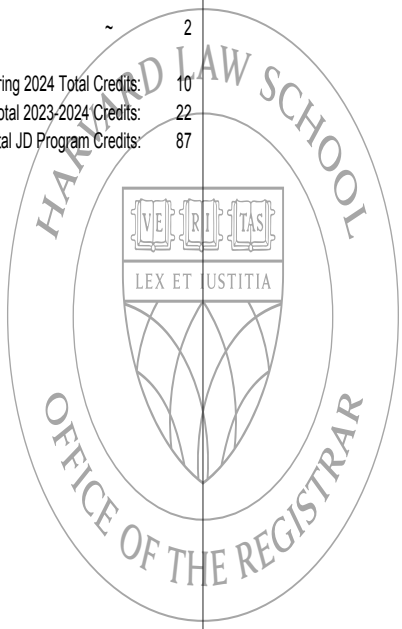
Date of Issue: June 2, 2023
Not valid unless signed and sealed

Spring 2024 Term: January 22 - May 10

2086	Federal Courts and the Federal System Fallon, Richard	~	5
8033	Health Law and Policy Clinic of the Center for Health Law and Policy Innovation Shachar, Carmel	~	3
2583	Policy Advocacy Workshop Broad Leib, Emily	~	2

Spring 2024 Total Credits: 10
Total 2023-2024 Credits: 22
Total JD Program Credits: 87

End of official record



Assistant Dean and Registrar

HARVARD LAW SCHOOL
Office of the Registrar
1585 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4612
www.law.harvard.edu
registrar@law.harvard.edu

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A student is in good academic standing unless otherwise indicated.

Accreditation

Harvard Law School is accredited by the American Bar Association and has been accredited continuously since 1923.

Degrees Offered

J.D. (Juris Doctor)
LL.M. (Master of Laws)
S.J.D. (Doctor of Juridical Science)

Current Grading System

Fall 2008 – Present: Honors (H), Pass (P), Low Pass (LP), Fail (F), Withdrawn (WD), Credit (CR), Extension (EXT)

All reading groups and independent clinicals, and a few specially approved courses, are graded on a Credit/Fail basis. All work done at foreign institutions as part of the Law School's study abroad programs is reflected on the transcript on a Credit/Fail basis. Courses taken through cross-registration with other Harvard schools, MIT, or Tufts Fletcher School of Law and Diplomacy are graded using the grade scale of the visited school.

Dean's Scholar Prize (*): Awarded for extraordinary work to the top students in classes with law student enrollment of seven or more.

Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
May 2011 - Present

Summa cum laude	To a student who achieves a prescribed average as described in the Handbook of Academic Policies or to the top student in the class
Magna cum laude	Next 10% of the total class following *summa* recipient(s)
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

All graduates who are tied at the margin of a required percentage for honors will be deemed to have achieved the required percentage. Those who graduate in November or March will be granted honors to the extent that students with the same averages received honors the previous May.

Prior Grading Systems

Prior to 1969: 80 and above (A+), 77-79 (A), 74-76 (A-), 71-73 (B+), 68-70 (B), 65-67(B-), 60-64 (C), 55-59 (D), below 55 (F)

1969 to Spring 2009: A+ (8), A (7), A- (6), B+ (5), B (4), B- (3), C (2), D (1), F (0) and P (Pass) in Pass/Fail classes

Prior Ranking System and Rules for Determining Honors for the JD Program

Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.

Prior to 1961, Harvard Law School ranked its students on the basis of their respective averages. From 1961 through 1967, ranking was given only to those students who attained an average of 72 or better for honors purposes. Since 1967, Harvard Law School does not rank students.

1969 to June 1998	General Average
Summa cum laude	7.20 and above
Magna cum laude	5.80 to 7.199
Cum laude	4.85 to 5.799

June 1999 to May 2010

Summa cum laude General Average of 7.20 and above (exception: *summa cum laude* for Class of 2010 awarded to top 1% of class)

Magna cum laude	Next 10% of the total class following *summa* recipients
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

Prior Degrees and Certificates

LL.B. (Bachelor of Laws) awarded prior to 1969.
The I.T.P. Certificate (not a degree) was awarded for successful completion of the one-year International Tax Program (discontinued in 2004).

Assistant Dean and Registrar

May 31, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I am writing in strong support of Katherine McClain Fleming's application for a clerkship in your chambers. A rising 3L student at Harvard Law School, Katherine was a stellar student in my 1L Constitutional Law course and has worked with me as a research assistant. I have every confidence that she will excel in a clerkship. I urge you to hire her.

Katherine was a star in Constitutional Law from the first day to the last. In class, her responses to cold calls were extremely insightful and demonstrated that she had read the cases closely and understood them deeply. She wrote reflection papers that managed to show, in a short space, a rare depth, creativity, and clarity of thought. She always strove to apply doctrines and theories beyond what we discussed in class. She attended office hours almost every week, and showed an intellectual curiosity and eagerness to learn that was inspiring and contagious. She drew upon her background working in legal aid and reproductive rights to engage critically with the material and identify its real-world impacts and consequences. She is a careful, attentive listener and a thoughtful, articulate communicator. On the final exam, she performed a tight, adept doctrinal analysis and a broader reflection on constitutional theory that earned her a top grade and a Dean's Scholar Prize in the course.

Katherine has been a hardworking and dedicated research assistant. She is a sophisticated thinker who is efficient and thorough in completing research and writing projects. She can tackle anything on short notice and turn it around swiftly. She is comfortable producing high-quality work on tight deadlines. She is a quick study, able to learn new skills and grasp complex issues in areas she has not previously studied. She has proven to be highly capable of reviewing hundreds of pages of documents, identifying the most important parts, and raising incisive questions and concerns. In one particularly memorable instance, Katherine did a fantastic job researching and drafting an excellent legal filing that resulted in a significant milestone victory in a difficult litigation.

Katherine is intellectually curious about any subject matter. She enjoys digging into legal doctrine. She can gracefully manage a busy schedule, navigate a hectic workload, and get along with colleagues beautifully. She maintains composure in challenging situations and adapts well to shifting circumstances. Katherine will thrive in the experience of immersive, intensive training across a wide range of legal areas that only a clerkship can provide. She is extremely easy to mentor and to have as a colleague. She hits all her marks, working constantly to improve and to help those around her. She is a great team player. She is lovely to interact with. She keeps an even keel in tense situations and listens carefully and fairly to all perspectives. And through it all her commitment to justice shines through.

I am very confident that Katherine will be a stellar law clerk. I give her my strongest recommendation and urge you to hire her.

Sincerely,

Jeannie Suk Gersen
John H. Watson, Jr. Professor of Law
Harvard Law School

PREGNANCY JUSTICE

June 12, 2023

The Honorable Beth Robinson
United States Court of Appeals, Second Circuit
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

I am writing to express my most enthusiastic support for Katherine Fleming's clerkship application. I had the great pleasure of supervising Ms. Fleming during her legal internship in summer 2022 at Pregnancy Justice (formerly National Advocates for Pregnant Women), where I am a staff attorney. Ms. Fleming exhibits all of the qualities that make a tremendous lawyer and judicial clerk—a sharp mind, superb legal research and writing skills, the ability to think both analytically and creatively, grace under pressure, and a deep devotion to justice. Ms. Fleming is far and away the most exceptional law student I have supervised, and would make a phenomenal addition to your chambers.

Ms. Fleming took on a wide breadth of challenging legal assignments with enthusiasm in the course of her internship. Although our organization was exceptionally busy during the summer of 2022, when *Dobbs v. Jackson Women's Health Organization* came down, no project proved too daunting for Ms. Fleming. Her most significant project involved researching and writing a 62-page issue brief entitled, *When Fetuses Gain Personhood: Understanding the Impact on IVF, Contraception, Medical Treatment, Criminal Law, Child Support, and Beyond*. To prepare for the brief, Ms. Fleming conducted extensive legal research across all 50 states regarding statutes and case law that grant fetuses the full constitutional rights of living persons. Her brief cogently argues that the fetal personhood movement poses myriad risks to the rights, health, and safety of pregnant persons. Her issue brief has been cited by the New York Times, and continues to be one of the most common resources Pregnancy Justice employs in our advocacy. Ms. Fleming also presented her brief at a convening of the State Innovation Exchange, a national coalition of legislators. Her presentation was clear and compelling, demonstrating her ability to translate a thorny web of legal issues into digestible themes for a broader audience.

Ms. Fleming expertly balanced her long-term writing projects with numerous shorter-term assignments, consistently turning drafts in far ahead

575 8th Avenue, Suite 700, New York, NY 10018 | 212-255-9252
PregnancyJusticeUS.org | info@pregnancyjusticeus.org

of her deadlines. Ms. Fleming's research and writing skills are simply unparalleled—I rarely had to edit her work, and had the utmost confidence in the strength of her underlying legal research and her analysis. She is extraordinarily self-motivated, organized, and a team player who voluntarily takes on additional assignments to help her colleagues. For instance, when I mentioned I was struggling to understand the expungement process for clients who had completed the terms of a deferred prosecution deal in Alabama, Ms. Fleming took it upon herself to research and write a thorough memo. Her work on this memo and the ideas for reform it generated informed a subsequent legislative advocacy campaign.

In addition to Ms. Fleming's remarkable intelligence and outstanding writing abilities, she is an absolute pleasure to spend time with. She is kind, considerate, and witty. She will make a phenomenal judicial clerk, and will go on to be an exceptional attorney and voice for justice. Please do not hesitate to contact me if there is any further information I can provide in support of Ms. Fleming's application.

Sincerely,

Emma Roth

Emma Roth
Staff Attorney
Pregnancy Justice
emma.r@pregnancyjusticeus.org
347-502-6785

June 05, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Dear Judge Robinson:

My name is Alexander Chen and I am the Founding Director of the Harvard Law School LGBTQ+ Advocacy Clinic (the "Clinic"), as well as a Lecturer on Law at Harvard Law School. It is my distinct pleasure to provide my strongest recommendation to Katherine Fleming for a clerkship in your chambers. Katherine was a student in my Gender Identity, Sexual Orientation, and the Law class and a student attorney in the Clinic in the fall of 2023. Without any hesitation, I can place Katherine as one of the top students I have worked with.

I assign a heavy workload of case reading and run my class via the Socratic method. LGBTQ+ law spans the gamut from family and health care law to criminal and constitutional law, and Katherine demonstrated a crisp, fluid, and detailed grasp of doctrine as we covered cutting-edge legal issues every week. Katherine's strong exam performance earned her an Honors grade in my course.

As a student attorney, Katherine earned a Dean's Scholar Prize for her truly stellar performance in the Clinic. Katherine managed a heavy workload and tight deadlines with impressive efficiency. She showed rigorous research and writing skills and organized her arguments effectively. She was versatile across a wide range of areas of law, completing memos on standing doctrine, administrative law, medical standards of care, federal statutory claims, and pleading strategies.

In particular, her solo authorship of a comprehensive policy white paper on Veterans Affairs benefits for LGBTQ+ surviving spouses was a bravura performance. Katherine stepped up to the plate when challenges experienced by another student team led us to reassign the project to her mid-term, after she had already demonstrated that she was an exceptional clinical student. With half the time and half the staffing resources we had initially allocated for the project, Katherine produced a thirty-page draft that Professor Dan Nagin, Legal Director of our Veterans Legal Clinic, with whom we were collaborating on the project, unhesitatingly called a "magnum opus." Her research laid an intellectual foundation we still refer to for our continued work in this area.

As this example attests, Katherine is an authentic team player, showing a consistently positive attitude and commendable flexibility in adapting quickly to changing circumstances and assignments. She built a collegial working relationship with her classmates and supervisors, exhibiting strong collaborative abilities. My colleague in the Clinic, Anya Marino, who served as her direct supervisor, stated on more than one occasion that it was an "absolute delight" to work with Katherine. She emphasized that Katherine is very thoughtful and clear in her communication, and always came to meetings incredibly prepared.

As someone who has held multiple demanding clerkships, I can confidently state that Katherine is one of those law students who is immediately recognizable as the prototype of an excellent future law clerk. On top of being brilliant, conscientious, earnest, and thoughtful, Katherine is also a genuine pleasure to be around. I have zero doubt that she would be an asset to any chambers she serves in.

Please do not hesitate to reach out to me at (617) 390-2656 or achen@law.harvard.edu if you have any questions.

Sincerely,

Alexander Chen

KATHERINE MCCLAIN FLEMING

15 Everett St., Apt. 45, Cambridge, MA 02138 ■ 617-990-6363 ■ kfleming@jd24.law.harvard.edu

WRITING SAMPLE

Drafted Spring 2023

The attached is an excerpt from a twenty-page research paper written for Professor Michele Goodwin's course, Reproductive Rights and Justice.

Wrongful Death:
A Loaded Gun of Fetal Personhood and Intimate Intimidation

Has woman a right to herself?
—Letter from Lucy Stone to Antoinette Brown Blackwell, 1855[1]

On a summer day in 1988, Sharon Bonte, seven months pregnant, was crossing Elm Street in Manchester, New Hampshire when a car struck her.[2] Paramedics rushed her to the hospital, where she delivered her daughter, Stephanie, by emergency caesarean section the next day.[3] Stephanie was born with brain damage and cerebral palsy.[4] Sharon Bonte had her hands full caring for her daughter. But soon she found herself defending a lawsuit too. Her husband, Andre Bonte, sued her on behalf of himself and Stephanie, claiming she was "negligent in failing to use reasonable care in crossing the street and failing to use a designated crosswalk."[5] The Supreme Court of New Hampshire held that a "a child born alive has a cause of action in tort against his or her mother for the mother's negligent conduct that results in prenatal injury," as a pregnant woman owes a legal duty of care to her fetus.[6] The dissenting justices warned that the majority had created a legal duty like no other: it would "govern such details of a woman's life as her diet, sleep, exercise, sexual activity, work and living environment, and . . . nearly every aspect of her health care"—in short, "every waking and sleeping moment."[7]

Thus, four months after *Planned Parenthood v. Casey* came down, the Supreme Court of New Hampshire flouted the U.S. Supreme Court's command that "[a] State may not give to a man

[1] Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 305 (1992) (quoting Letter from Lucy Stone to Antoinette Brown Blackwell (July 11, 1855)).
[2] Doina Chiacu, *Family Wins $850,000 in Fetal Injury Case with AM-Pledge-Abortion, Bjt*, AP (Oct. 11, 1990), https://apnews.com/article/2586208ad96662446d05b7994eb3cb09.
[3] Bonte for Bonte v. Bonte, 136 N.H. 286, 287 (N.H. 1992).
[4] *Id*.
[5] *Id*. at 287.
[6] *Id*. at 290.
[7] *Id*. at 292.

the kind of dominion over his wife that parents exercise over their children."[8] *Casey* found that Pennsylvania's spousal notification provision gave a husband a "troubling degree of authority over his wife" that "leads to consequences reminiscent of the common law":

> Perhaps next in line would be a statute requiring pregnant married women to notify their husbands before engaging in conduct causing risks to the fetus. After all, if the husband's interest in the fetus' safety is a sufficient predicate for state regulation, the State could reasonably conclude that pregnant wives should notify their husbands before drinking alcohol or smoking.[9]

Or crossing the street. New Hampshire permitted a husband to use tort law as a vehicle to exercise dominion over his wife, on behalf of himself and their child.

On a summer day in 2022, three decades later, a woman in Houston, Texas texted three of her friends that she had taken a pregnancy test at work and thrown it out in an outdoor trash can so that her husband, Marcus Silva, would not see.[10] They responded with advice about how to order medication abortion online from Aid Access and feign a "heavy period."[11] Her friends warned her about her husband: "you need to remove yourself from him," as he might "snake his way into your head."[12] She thanked her friends, telling them, "your help means the world to me. Im [sic] so lucky to have y'all."[13] Little did these friends know that their text messages, along with a photo of them dressed in *The Handmaid's Tale* costumes,[14] would end up splayed across the pages of a legal petition. Silva read and photographed his wife's texts, "rifled" through her purse, found a mifepristone pill, and put it back.[15] Two weeks after the abortion, he confronted her and threatened to have her thrown in jail if she did not give herself to him "mind body and soul" until

[8] Planned Parenthood v. Casey, 505 U.S. 833, 898 (1992).
[9] *Id*.
[10] Plaintiff's Original Petition at 7, Silva v. Noyola, Carpenter, & Garcia, No. 23-CV-0375 (Tex. Dist. Mar. 9, 2023).
[11] *Id*. at 3.
[12] *Id*. at 5–6.
[13] *Id*. at 5.
[14] *Id*. at 7.
[15] Defendants/Counter-Plaintiffs Jackie Noyola's and Amy Carpenter's Original Answer and Counterclaims at 2, Silva v. Noyola, Carpenter, & Garcia, No. 23-CV-0375 (Tex. Dist. May 9, 2023).

their divorce was finalized.[16] She felt "trapped" and forced to "do whatever he says," as he wielded the photographs over her head to prevent her from leaving.[17] Her friends explained that Silva, a "serial emotional abuser," was not interested in stopping the abortion.[18] Rather, he "wanted to obtain evidence he could use against her if she refused to stay under his control."[19]

Use it he did. In March 2023, one month after the divorce,[20] Silva sued his ex-wife's friends, arguing that "a person who assists a pregnant woman in obtaining a self-managed abortion has committed the crime of murder and can be sued for wrongful death."[21] He seeks over one million dollars in damages and an injunction blocking them from distributing medication abortion or assisting in self-managed abortions.[22] Jonathan Mitchell, the infamous architect of Texas's S.B. 8 law, represents Silva.[23] The suit is the latest twist on the longstanding tactic of men weaponizing tort law against former partners over abortion and behavior during pregnancy.

Professor Mary Ziegler describes the suit as attempting to "start a personhood trend" in the states.[24] Similarly, Professor Melissa Murray calls it a "backdoor way" to embed fetal personhood in law.[25] But using wrongful death is not so much taking the backdoor as walking in the front door that was left unlocked a long time ago. What makes the strategy so dangerous is how mainstream wrongful death is. It is not, for instance, an absurd law about fetuses counting as persons to meet

[16] *Id*.
[17] *Id.*
[18] *Id*. at 1.
[19] *Id*. at 2.
[20] *Id.* at 3.
[21] Plaintiff's Original Petition at 1. While the petition uses the full names of Silva's ex-wife and her friends, I have chosen not to use them in this paper. Silva intends to expose, humiliate, and destroy the privacy of these four women. I do not wish to further those goals by repeating their names unnecessarily.
[22] *Id*. at 11.
[23] *Id*.
[24] Mary Ziegler, *The Real End Goal of the Anti-Choice Texas Abortion Lawsuit*, SLATE (Mar. 28, 2023), https://slate.com/news-and-politics/2023/03/personhood-laws-anti-choice-texas-abortion-lawsuit.html.
[25] *Strict Scrutiny: Is It Infringement If It's Funny? (with Senator Mazie Hirono)*, CROOKED MEDIA (Mar. 27, 2023), https://podcasts.apple.com/us/podcast/is-it-infringement-if-its-funny/id1469168641?i=1000606035429.

carpool lane human occupancy requirements.[26] Wrongful death is an entrenched body of law that has been expanded, judicially and legislatively, in over forty states to allow recovery for wrongful death of a fetus. For decades it has lain about like "a loaded weapon" [27]—and sometimes been used as one. Men have been mobilizing wrongful death, along with prenatal negligence and other civil claims, against their former partners since shortly after *Roe v. Wade*.[28] Now, in the latest offensive in the war on women, Jonathan Mitchell has spotted its potential for harm and added to the preexisting strategy a new twist: targeting intimate associates.

The wrongful death strategy illustrates that, while the focus has been on *Dobbs*' criminal implications, we must be equally alert to civil implications. Taking the long view of tort as a vehicle for fetal personhood shows how much the *Casey* principle—that a state should not give to a husband the kind of dominion a parent exercises over a child[29]—had eroded before *Dobbs*. As *Bonte* shows, states "allow[ed] children and fathers alike to exert the kind of dominion over women that *Casey* decried."[30] After *Dobbs*, the already attenuated *Casey* barrier is gone. Then-Judge Samuel Alito of the Third Circuit would have upheld the spousal notification provision *Casey* struck down.[31] *Dobbs*' originalism bakes in women's subordination and second-class citizenship as the reference point for constitutional interpretation,[32] making the moment ripe for men to assert claims of dominion over women.

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[26] Caitlin Cruz, *Texas Republican Proposes Bill to Let Pregnant People Drive in the HOV Lane*, JEZEBEL (Oct. 15, 2021), https://jezebel.com/texas-republican-proposes-bill-to-let-pregnant-people-d-1847871298. *See also* Timothy Bella, *Pregnant woman given HOV ticket argues fetus is passenger, post-Roe*, WASH. POST (July 10, 2022), https://www.washingtonpost.com/nation/2022/07/09/texas-abortion-pregnant-woman-hov-bottone/.
[27] Korematsu v. United States, 323 U.S. 214, 243–44 (1944) (Jackson, J., dissenting).
[28] 410 U.S. 113 (1973).
[29] *Casey*, 505 U.S. at 898.
[30] PREGNANCY JUSTICE, WHEN FETUSES GAIN PERSONHOOD: UNDERSTANDING THE IMPACT ON IVF, CONTRACEPTION, MEDICAL TREATMENT, CRIMINAL LAW, CHILD SUPPORT, AND BEYOND 20 (2022).
[31] Planned Parenthood v. Casey, 947 F.2d 682, 725–27 (3d Cir. 1991) (Alito, J., concurring in part).
[32] Dobbs v. Jackson Women's Health Organization, 142 S.Ct. 2228, 2325 (2022) (Breyer, J., Sotomayor, J., and Kagan, J., dissenting) ("When the majority says that we must read our foundational charter as viewed at the time of ratification (except that we may also check it against the Dark Ages), it consigns women to second-class citizenship.").

Professor Reva Siegel theorizes the dynamic of preservation-by-transformation: "status-enforcing state action evolves in form as it is contested."[33] Only by recognizing what is old, as well as what is new, can we understand the wrongful death strategy. Professor Michele Goodwin lays out "Taxonomies of Legal Innovation" in policing the womb and expanding fetal personhood.[34] The foundation for this strategy is a prior wave of legal innovation: courts applied old laws and interpreted them in new ways and legislatures amended old laws to expand existing remedies. While some actors may have been pushing for fetal personhood in a long game to undermine reproductive freedom, some were motivated by a reformist impulse to recognize reproductive harm in law.[35]

We are now in a second wave of legal innovation. The edifice of fetal personhood in tort law, built to recognize reproductive harm to pregnant people, is being weaponized against them. Jonathan Mitchell did not begin this wave. There were stirrings long before *Dobbs*. Since the 1980s, if not earlier, men have mobilized tort law against their former partners. But this current wave is likely to gain momentum, now without the (already eroded) seawalls of *Roe* and *Casey*.

Mitchell's strategy of using wrongful death to harass a former partner's friends is a novel twist, but the broader playbook is old. First, it echoes prior efforts by men to use wrongful death, prenatal negligence, and other forms of civil law to harass their former partners over abortion and behavior during pregnancy. Second, it mirrors how feticide laws—framed as protecting pregnant

[33] Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997).

[34] MICHELE GOODWIN, POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD 30 (2020) ("(1) old laws are applied and interpreted in new ways; (2) old laws are slightly amended to expand existing prescriptions and sanctions; (3) new laws are applied in unintended ways against pregnant women; and (4) new laws are introduced that expressly create new prescriptions and sanctions").

[35] Greer Donley & Jill Wieber Lens, *Abortion, Pregnancy Loss, & Subjective Fetal Personhood*, 75 VANDERBILT L. REV. 1649, 1687–88 (2022) ("The original motivation . . . had nothing to do with biology, personhood, or abortion. Instead, it was due to the strange outcome where a fetus injured in the womb could recover in tort after birth, but no claim existed for tortious fetal death; killing a fetus, despite being a graver injury, was not subject to recovery . . . . [S]ome more recent legislative amendments . . . were motivated by antiabortion strategy to accord full legal personhood to a fetus, especially if applied to miscarriage, but this was not the original purpose.").

women—are weaponized against pregnant women themselves by aggressive prosecutors. Third, it mimics prior playbooks of turning people against each other and breaking families apart: the Fugitive Slave Act, the drug war, and the family policing system. Understanding the strategy's historical roots illuminates that, while fetal personhood might initially appear to be the animating goal, the heart of the strategy is men's intimidation, abuse, isolation, and harassment of their intimate partners and erosion of social relationships.

We need not let this wrongful death wave drown us. Legislative advocacy should push for explicit clarification that wrongful death cannot be weaponized against pregnant and postpartum people. Legal exceptions are not enough. In the realm of pregnancy, lawlessness reigns, as rogue prosecutors charge women even when laws state that they cannot be charged.[36] Exceptions can help, though. Reproductive justice advocates are working to train and support criminal defense attorneys to confront a rising tide of pregnancy criminalization after *Dobbs*.[37] We must not overlook the importance of equipping attorneys to combat the tide of civil suits as well.

This paper will discuss what is old about the wrongful death strategy, what is novel, what its goals are, and how to combat it. Part I surveys the preexisting architecture of fetal personhood in wrongful death law. Part II opens with how men have used tort and other forms of civil law to harass their pregnant partners before. It then draws a parallel to the weaponization of feticide laws in pregnancy criminalization. Finally, it explores how the playbook of turning friends and family

[36] *See* Sam Levin, *She lost her child in a home birth. Prosecutors charged her with murder*, THE GUARDIAN (Apr. 3, 2023), https://www.theguardian.com/us-news/2023/apr/03/pregnancy-birth-murder-charge-kelsey-carpenter-san-diego ("Prosecutors have continued to pursue the case despite the county medical examiner saying the manner of death was an 'accident'; medical experts testifying that the state's cause-of-death claims were not backed by scientific evidence; and the passage of a new California law explicitly prohibiting the criminalization of pregnancy loss."); Brief of Pregnancy Justice et al. as Amici Curiae in Support of Plaintiffs-Appellees Seeking Affirmance in Part and Reversal in Part at 8–9, in Isaacson v. Brnovich, CV-21-01417-PHX-DLR 1, 2 (D. Ariz. July 11, 2022) (describing how, despite the provision in Missouri's personhood law that specifies that it does not create a cause of action against a woman "for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care," prosecutors continue to rely upon it to charge pregnant and postpartum women).

[37] *See, e.g.*, PREGNANCY JUSTICE, CONFRONTING PREGNANCY CRIMINALIZATION: A PRACTICAL GUIDE FOR HEALTHCARE PROVIDERS, LAWYERS, MEDICAL EXAMINERS, CHILD WELFARE WORKERS, AND POLICYMAKERS (2022).

against each other echoes playbooks of the Fugitive Slave Act, the drug war, and the family policing system. Part III discusses what is new: using wrongful death itself as the vehicle to turn people against each other. It argues that, while fetal personhood might appear to be the animating goal, the heart of the strategy is intimate intimidation and breakdown of social bonds. Part IV charts a path to fight back through legislative advocacy and reproductive justice lawyering.

I. The Preexisting Architecture of Fetal Personhood in Wrongful Death Laws

The common law principle, as expressed in the 1884 Supreme Judicial Court of Massachusetts case, *Dietrich v. Inhabitants of Northampton*, was that the fetus was "a part of the mother," so "any damage to it which was not too remote to be recovered for at all was recoverable by [the mother]."[38] But the longstanding *Dietrich* principle, or body part theory, no longer governs in most states. In over forty states, including Texas, wrongful death statutes have been judicially interpreted or legislatively amended to include fetal death, either by including a fetus within the statutory definition of "person" or creating a separate cause of action for a fetus.[39]

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[38] 138 Mass. 14, 17 (Mass. 1884).

[39] Mack v. Carmack, 79 So. 3d 597, 599–611 (Ala. 2011) (per curiam); ALASKA STAT. ANN. § 09.55.585 (West); Summerfield v. Super. Court, 698 P.2d 712, 724 (Ariz. 1985) (en banc); ARK. CODE ANN. § 16-62-102 (Supp. 2015); Hatala v. Markiewicz, 224 A.2d 406, 408 (Conn. Super. Ct. 1966); Worgan v. Greggo & Ferrara, Inc., 128 A.2d 557, 558 (Del. Super. Ct. 1956); Greater Se. Cmty. Hosp. v. Williams, 482 A.2d 394, 398 (D.C. 1984); Porter v. Lassiter, 87 S.E.2d 100, 102–03 (Ga. Ct. App. 1955); Castro v. Melchor, 366 P.3d 1058, 1065–66 (Haw. Ct. App. 2016), *aff'd*, 414 P.3d 53 (Haw. 2018); Volk v. Baldazo, 651 P.2d 11, 12, 15 (Idaho 1982); 740 ILL. COMP. STAT. ANN. 180 / 2.2 (West 2010); Dunn v. Rose Way, Inc., 333 N.W.2d 830, 833–34 (Iowa 1983) (en banc); IND. CODE § 34-23-2-1(b)-(c) (2019); KAN. STAT. ANN. § 60-1901(a)-(c) (Supp. 2015); Mitchell v. Couch, 285 S.W.2d 901, 904-06 (Ky. 1955); LA. CIV. CODE ANN. art. 26 (2010); State ex rel. Odham v. Sherman, 198 A.2d 71, 72–73 (Md. 1964); Mone v. Greyhound Lines, Inc., 331 N.E.2d 916, 917 (Mass. 1975); MICH. COMP. LAWS ANN. § 600.2922a(1) (West 2017); Verkennes v. Corniea, 38 N.W.2d 838, 841 (Minn. 1949); MISS. CODE ANN. § 11-7-13 (2019); Connor v. Monkem Co., Inc., 898 S.W.2d 89, 92 (Mo. 1995); NEB. REV. STAT. § 30-809(1) (2019); White v. Yup, 458 P.2d 617, 623–24 (Nev. 1969); Poliquin v. Macdonald, 135 A.2d 249 (N.H. 1957); Salazar v. St. Vincent Hosp., 619 P.2d 826, 830 (N.M. Ct. App. 1980); DiDonato v. Wortman, 358 S.E.2d 489, 490 (N.C. 1987); Hopkins v. McBane, 359 N.W.2d 862, 865 (N.D. 1984); Werling v. Sandy, 476 N.E.2d 1053, 1054 (Ohio 1985); OKLA. STAT. ANN. tit. 12, § 1053F (West 2015); Libbee v. Permanente Clinic, 518 P.2d 636, 638 (Or. 1974) (en banc); Amadio v. Levin, 501 A.2d 1085, 1089 (Pa. 1985); Presley v. Newport Hosp., 365 A.2d 748, 756 (R.I. 1976) (Bevilacqua, C.J., concurring in part and dissenting in part); Fowler v. Woodward, 138 S.E.2d 42, 44–45 (S.C. 1964); S.D. CODIFIED LAWS § 21-5-1 (1984); TENN. CODE ANN. 20-5-106(d) (1992); TEX. CIV. PRAC. & REM. CODE ANN. § 71.003 (West 2008); Carranza v. U.S., 267 P.3d 912 (Utah 2011); Vaillancourt v. Med. Ctr. Hosp. of Vermont, 425 A.2d 92, 94 (Vt. 1980); Moen v. Hanson, 537 P.2d 266, 268 (Wash. 1975) (en banc); Baby Farley v. Sartin, 466 S.E.2d 522, 535 (W. Va. 1995); Kwaterski v. State Farm Mut. Auto. Ins. Co., 148 N.W.2d 107, 112 (Wis. 1967). PREGNANCY JUSTICE, *supra* note 30, at 16; Jill Wieber Lens, *Children, Wrongful Death, and Punitive Damages*, 100 B.U. L. REV. 437, 448 (2020).

Looking across the two waves of innovation, then, reveals a peculiar dynamic. In the first wave, the shift from treating the fetus as part of the pregnant person's body to treating it as a separate being could be seen as an important stride toward recognizing the pain and distress of reproductive harm and pregnancy loss. Greer Donley and Jill Wieber Lens argue that wrongful death's conception of the fetus as "separate from the mother . . . reflects that most women feel the death of their stillborn baby is the death of a child, and something much graver than a broken leg."[40] They argue that tort provides a "model of recognizing subjective, relational fetal value that does not collapse into personhood-at-conception."[41] They contend that abortion rights advocates, whose devaluation of the fetus has alienated those who have experienced pregnancy loss, can learn from tort to acknowledge subjective fetal personhood without "ceding ground" to opponents.[42]

But the second wave of legal innovation weaponizes that tort model against the pregnant persons it is supposed to benefit. It is difficult, even dangerous, to have the kind of nuance a subjective fetal personhood framework requires when bomb throwers like Jonathan Mitchell (and literal bomb-throwers at clinics) are setting the legal agenda. If you give them an inch, they will take a mile and sue you for a million dollars in damages.

II. What Is Old

A. How Men Have Used Tort Law Against Their Partners Before

In the 1980s in Arkansas, Sheryl Carpenter, eight-and-a-half months pregnant, died in a tragic car accident.[43] Her husband sued her estate on behalf of himself, their children, and the fetus, arguing that she "negligently caused the death of the fetus" by crashing into a bridge abutment.[44]

[40] Donley & Lens, *supra* note 35, at 1687.
[41] *Id*. at 1650.
[42] *Id*. at 1650, 1683.
[43] Carpenter v. Bishop, 720 S.W.2d 299, 299–300 (Ark. 1986).
[44] *Id*.

The Supreme Court of Arkansas dismissed all the claims, citing "parental immunity doctrine," and dodged the question of whether "a viable fetus born dead is a 'person' who has a cause of action under the wrongful death statute."[45] In concurrence, Justice George Rose Smith predicted that parental immunity doctrine's "life expectancy is short," as the *Second Restatement of Torts* and more than half of the states had rejected it.[46] He argued, even so, that the case fell within *Dietrich*'s principle, as the fetus was "completely dependent upon the mother when the accident occurred."[47] Justice Smith closed with a ringing condemnation of the legal strategy: "the theory that the mother's negligence somehow violated a duty she owed to them is repugnant to one's sensibilities. I do not believe that the law should countenance a cause of action as ignoble as this one."[48]

In 2003 in Wisconsin, Alicia Vander Meulen was injured in a car accident and experienced a stillbirth.[49] Shannon Tesar, who alleged he was "the father of her unborn child," argued that Vander Meulen's automobile insurer "should be liable for [her] negligence in the death of her fetus."[50] The trial court concluded that Vander Meulen did not owe a legal duty to her fetus and, even if she were found negligent, "public policy prevented liability," given the potential "slippery slope."[51] But the state appellate court allowed the cause of action to proceed, pointing out that a fetus is a person under Wisconsin's wrongful death statute and Wisconsin had abolished parental immunity.[52] The court reasoned that no public policy supports "disparate treatment" in which "the father of a one-day-old child or the child may sue the mother for damages . . . caused by the

[45] *Id*.
[46] *Id*. at 300 (Smith, J., concurring).
[47] *Id*. at 301.
[48] *Id*.
[49] Tesar v. Anderson, 789 N.W.2d 351, 354 (Wis. App. 2010).
[50] *Id*.
[51] *Id*.
[52] *Id*. at 361.

mother's post-birth negligence, but the father of a fetus injured one day from its estimated date of delivery may not sue its mother for damages caused by the mother's negligence."[53]

In 2019 in Alabama, Ryan Magers brought a wrongful death suit against an abortion clinic on behalf of an aborted fetus almost two years after his ex-girlfriend had an abortion.[54] An Alabama probate court judge granted Magers' petition to permit him to represent the estate of the fetus.[55] Magers' claim was ultimately dismissed on appeal for failure to comply with briefing rules,[56] but the strategy was here to stay. In 2020 in Arizona, Mario Villegas, inspired by Magers, brought a wrongful death action against an abortion clinic on behalf of "Baby Villegas" four years after his ex-wife had an abortion.[57] The president of the Arizona chapter of the National Council of Jewish Women, Civia Tamarkin, called the suit "a trial balloon to see how far the attorney and the plaintiff can push the limits of the law, the limits of reason, the limits of science and medicine."[58] Villegas' ex-wife stated that he was "emotionally abusive," "wouldn't allow her to get a job or leave the house unless she was with him," "made fake social media profiles, hacked into her social media accounts and threatened to 'blackmail' her if she left him."[59] As Professor Carliss Chatman points out, this story illustrates how civil remedies can be weaponized as "a mechanism for men to continue to abuse their former partners through the court system."[60] Chatman captures the core of the strategy powerfully: "It's another way to torture a woman."[61]

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[53] *Id*.
[54] EJ Dickson, *Alabama Court Awards Aborted Fetus the Right to Sue Abortion Clinic*, ROLLING STONE (March 6, 2019), https://www.rollingstone.com/culture/culture-news/abortion-court-sue-fetus-rights-alabama-804213/.
[55] *Id*.
[56] Magers v. Alabama Women's Ctr. Reprod. Alternatives, LLC, 325 So. 3d 788, 788–89 (Ala. 2020).
[57] Nicole Santa Cruz, *Her Ex-Husband Is Suing a Clinic Over the Abortion She Had Four Years Ago*, PROPUBLICA (July 15, 2022), https://www.propublica.org/article/arizona-abortion-father-lawsuit-wrongful-death.
[58] *Id*.
[59] *Id*.
[60] *Id*.
[61] *Id*.

Applicant Details

First Name	**Marcia**
Middle Initial	**J.**
Last Name	**Foti**
Citizenship Status	**U. S. Citizen**
Email Address	**mfoti@pennlaw.upenn.edu**
Address	**Address** Street **1070 Lake Avenue** City **Greenwich** State/Territory **Connecticut** Zip **06831** Country **United States**
Contact Phone Number	**203-521-5852**

Applicant Education

BA/BS From	**Stanford University**
Date of BA/BS	**June 2013**
JD/LLB From	**University of Pennsylvania Carey Law School** **https://www.law.upenn.edu/careers/**
Date of JD/LLB	**May 15, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**University of Pennsylvania Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Keedy Cup**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Hoffman, Allison
ahoffman@law.upenn.edu
(215) 898-8631
Burbank, Stephen
sburbank@law.upenn.edu
(215) 898-7072
Lee, Sophia
slee@law.upenn.edu
215-573-7790

This applicant has certified that all data entered in this profile and any application documents are true and correct.

MARCIA FOTI
1070 Lake Avenue, Greenwich, CT 06831
(203) 521-5852 | mfoti@pennlaw.upenn.edu

June 15, 2023

The Honorable Beth Robinson
United States Court of Appeals for the Second Circuit
Federal Building
11 Elmwood Avenue
Burlington, Vermont 05401

Dear Judge Robinson:

I recently graduated *magna cum laude* from the University of Pennsylvania Carey Law School and was elected to the Order of the Coif. I am writing to apply for a clerkship in your chambers for the 2024-2025 term, after I have completed my district court clerkship with Chief Judge Robert Shelby in the District of Utah. I want to clerk in a federal appellate court to supplement and deepen my legal studies in a rigorous and thoughtful environment.

I am particularly interested in your chambers after I had the opportunity to speak with one of your clerks, Halle Edwards. She discussed how you make yourself readily available to clerks for conversations about cases and your nontraditional bench memos with summaries and analyses of the case law. This is appealing to me. During law school I served as a research assistant to Professor Allison Hoffman. Professor Hoffman encouraged her research assistants not only to summarize the relevant laws and regulations, but to engage with a critical eye. Our memos were expected to present legal analysis and to suggest an answer to whatever legal question she had presented to us. She made herself available for discussion, and I appreciated our conversations about thorny and complicated issues in health law. The relationship was extremely fruitful, and I would enjoy having a similar dynamic in my clerkship.

On a personal note, your background fighting for LGBTQ+ rights and your status as the first openly lesbian circuit court judge means a great deal to me. As a queer woman myself, I am grateful for the monumental work that has already been accomplished and I am all too aware of the work that still needs to be done.

Enclosed, please find my resume, law transcript, undergraduate transcript, and writing sample. I have also included letters of recommendation from Professor Stephen Burbank, Professor Allison Hoffman, and Professor Sophia Lee.

Professor Stephen Burbank	Professor Allison Hoffman	Professor Sophia Lee
(508) 246-8674	(937) 271-4346	(215) 573-7790
sburbank@law.upenn.edu	ahoffman@law.upenn.edu	slee@law.upenn.edu

If there is any other information that would be helpful to you, please feel free to reach out to me directly at (203) 521-5852 or mfoti@pennlaw.upenn.edu. Thank you for your consideration.

Respectfully,

Marcia Foti

MARCIA FOTI
1070 Lake Avenue, Greenwich, CT 06831
(203) 521-5852 | mfoti@pennlaw.upenn.edu

EDUCATION

University of Pennsylvania Carey Law School, Philadelphia, PA
J.D., *magna cum laude*, May 2023

Honors: Order of the Coif
University of Pennsylvania Law Review, Philanthropy Editor, Volume 171
Exemplary Pro Bono Service Award for 400+ pro bono hours
Honors in First Year Legal Practice Skills

Activities: Democracy Law Project, Co-President
Keedy Cup, Quarterfinalist
Moot Court Board, Member
Appellate Advocacy, Teaching Assistant
Penn Law Lambda, Admissions & Recruitment Chair
Morris Fellow, serving as mentor to 1L students

Stanford University, Stanford, CA
B.A., Political Science, with a minor in Economics, June 2013

EXPERIENCE

U.S. District Court for the District of Utah, Salt Lake City, UT 2023–2024
Incoming Judicial Clerk to Chief Judge Robert Shelby

Dechert, Philadelphia, PA September 2022–Present
Federal Appellate Litigation Extern

One of four Penn Law students selected to participate in the Dechert Federal Appellate Litigation Externship. Representing a pro bono client in a Third Circuit habeas corpus appeal along with two supervising attorneys. Conducting legal research on issues of ineffective assistance of counsel and eyewitness identification. Writing the initial drafts of the opening and reply briefs.

University of Pennsylvania Carey Law School, Philadelphia, PA April 2021–May 2023
Research Assistant to Professor Allison Hoffman

Currently conducting research for the third edition of Politics of Medicare, which includes revising and editing chapters from prior editions. Researched Medicare Star Ratings litigation to support a Commonwealth Fund grant project. Researched employment-based health insurance trends during the COVID-19 pandemic for a law review publication. Researched and wrote memo on Centers for Medicare and Medicaid Services (CMS) payment decision on Alzheimer's disease drug Aduhelm.

Department of Justice, Civil Fraud Section, Washington, D.C. June 2022–August 2022
Summer Intern

Conducted legal research to support ongoing investigations and affirmative litigation for the United States, focusing on the False Claims Act and the Anti-Kickback Statute. Gained exposure to a wide array of trial processes, including depositions, witness interviews, and internal litigation strategy meetings.

King & Spalding, Washington, D.C. May 2021–July 2021, May 2022–June 2022
Summer Associate

Performed legal research and writing for the healthcare and life sciences teams. Conducted an analysis of comment letters for use in a reply brief filed before the Supreme Court on CMS's reimbursement calculation for disadvantaged share hospitals. Wrote client-facing publications on state legislative efforts to increase

provider price transparency, on California's SB-642 bill to strengthen the prohibition of the corporate practice of medicine, on the D.C. District Court's decision in *Milton S. Hershey Medical Center v. Becerra*, and on the Ninth Circuit's decision in *AK Futures LLC v. Boyd St. Distro, LLC*. Drafted comment letter to CMS on its proposed changes to the direct graduate medical education formula. Drafted motion for reinstatement of a case before the Medicare Provider Reimbursement Review Board. Researched and wrote memo on cases brought against public and private insurers who denied coverage for gender-confirming care for transgender plaintiffs.

Boston Scientific, Marlborough, MA June 2014–September 2020

Senior Policy Analyst, Global Health Policy (2017-2020)

Organized and wrote company comment letters for submission to CMS on payment policies, including annual updates to the payment systems, telehealth services billing, and on neuromodulation technology as a pain management alternative to opioids. Liaised with trade organizations on content for comment letters and presentations before policymakers. Prepared executive committee memos on relevant CMS rules and wrote corporate policy statements on national and global topics of interest such as national preferences laws, site-neutral payment rates, and the use of real-world evidence in regulatory decisions.

Analyst II, Health Economics and Market Access: Endoscopy (2014-2017)

Prepared reimbursement analytics for internal and external customers in pulmonary and gastrointestinal endoscopy. Maintained customer-facing tools and answered customer questions on reimbursement through a HelpDesk.

Research Labs, Stanford, CA September 2011–June 2013

Stanford Neuroscience and Pain Lab, Undergraduate Research Assistant (2011-2013)

Scored neurocognitive tests and performed statistical analyses. Analyzed fMRI and diffusion tensor imagining (DTI) scans. Co-authored two poster presentations at an American Pain Society Annual Meeting.

Ashley Lab, Undergraduate Research Assistant (2011-2012)

Served on-call for heart transplant retrieval surgeries to harvest human myocardium tissue to determine genetic markers of heart failure. Assisted with DNA and RNA laboratory tasks.

RESEARCH PUBLICATIONS

Foti MJ, Baker KS, Jastrzab LE, Stringer EA, Mackey SC, Younger JW (2013). Improvements in cognition following opioid detoxification program. Poster presented at the 32nd Annual Meeting of the American Pain Society (APS).

Baker KS, **Foti MJ**, Jastrzab LE, Stringer EA, Mackey SC, Younger JW (2013). Immediate and lasting Improvements in depression following rapid opioid detoxification. Poster presented at the 32nd Annual Meeting of the American Pain Society (APS).

Pan S, Caleshu CA, Dunn KE, **Foti MJ**, Moran MK, Soyinka O, Ashley EA. Cardiac structural and sarcomere genes associated with cardiomyopathy exhibit marked intolerance of genetic variation. *Circulation Cardiovascular Genetics.* 2012; 5 (6): 602-610.

INTERESTS

Earned Girl Scout Silver & Gold Award. Avid runner. Ran the 2022 NYC Marathon and 2018 Boston Marathon but prefers half marathons. Enjoy hiking with my dog Beckett.

MARCIA FOTI
UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

Spring 2023

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS
Remedies and Litigation Strategy	Wendy Beetlestone / Stella Tsai / Mary Catherine Roper	A+	3
Psychology of Legal Decision-Making	Tess Wilkinson-Ryan / David Hoffman	A+	3
Insurance Law	Tom Baker	A	3
Law Reform Litigation	Mark Aronchick	A	1
Moot Court Board	Gayle Gowen	CR	2
Law Review – Board Member		CR	2

Fall 2022

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS
Evidence	Kimberly Ferzan	A-	4
Constitutional Criminal Procedure	David Rudovsky	B+	3
Professional Responsibility	Diana Ashton / Deborah Winokur	A	2
Externship: Federal Appellate Litigation	Louis Rulli / Cara McClellan	CR	4
Moot Court Board	Gayle Gowen	CR	2
Law Review – Board Member		CR	0

Spring 2022

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS
Health Law	Allison Hoffman	A+	3
Federal Income Tax	Chris Sanchirico	A	3
Independent Study	Allison Hoffman	A	3
Privacy Law	Christopher Yoo / Lauren Steinfeld	A-	3
Keedy Cup Preliminaries	Gayle Gowen	CR	1
Law Review – Associate Editor		CR	0

Fall 2021

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS
Constitutional Litigation	Seth Kreimer	A-	4
Antitrust	Herbert Hovenkamp	A	3

Appellate Advocacy	Robert Zauzmer	A-	3
Investigating & Prosecuting National Security	Jennifer Williams / Patricia Hund Zebertavage	A	2
Health Care Fraud	Paul Kaufman	A-	2
Law Review – Associate Editor		CR	1

Spring 2021

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS
Constitutional Law	Mitchell Berman	A-	4
Criminal Law	Stephen Morse	B+	4
Administrative Law	Sophia Lee	A	3
Law and Inequality	Karen Tani / Shaun Ossei-Owusu	A-	3
Legal Practice Skills	Solmaz Firoz	H	2
Legal Practice Skills Cohort	Mary Felder	CR	0

Fall 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS
Civil Procedure	Stephen Burbank	A	4
Torts	Eric Feldman	A	4
Contracts	Tess Wilkinson-Ryan	A-	4
Legal Practice Skills	Solmaz Firoz	H	4
Legal Practice Skills Cohort	Mary Felder	CR	0

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

June 11, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Re: Clerkship Applicant Marcia Foti

Dear Judge Robinson:

I am writing with my very strongest recommendation of Marcia Foti for a judicial clerkship in your chambers. Marcia is one of the most impressive students, thinkers, and people I have worked with in my time as an academic. She has been my research assistant since summer 2021. In Spring 2022, she was also a student in my Health Law and Policy class, and I supervised her law review note as an independent study. I have been consistently impressed by the quality of her mind, her work, and her character.

I met Marcia in spring 2021 when a colleague who taught her during her first year in law school referred Marcia to me because of her interest in health law. My colleague encouraged me to scoop her up as a research assistant if I could, after having observed her 1L work, and I was lucky enough to do so. Since then, Marcia has produced the highest-quality research and writing to support my publications. My primary project now is writing a 3rd edition of The Politics of Medicare, a classic volume on the passage of the program and its evolution in the half century since. As I join my mentor, Ted Marmor, as a co-author, I have revised chapters from the first editions through 2000 and have added recent history with Marcia's skilled assistance. I have sent Marcia down some challenging pathways, trying to gain clarity on the historical chapters, and she consistently delivers. As one example, a chart in the first chapter did not match the description in the text and was not well cited. Marcia tracked down the original source from the 1960s, which revealed that, for two editions, the book included a picture of a chart that came before the one that was described.

More noteworthy is the quality of Marcia's writing and research on difficult regulatory subjects. I asked her, for example, to figure out why physicians were motivated to participate in new risk-sharing models developed by the Centers for Medicare and Medicaid (CMS) Innovation Center. Marcia untangled and explained in clear terms the extremely complex government reimbursement structures that created these incentives. She drew on her past work experience at Boston Scientific to give context to Medicare's quality initiatives and why these new models could mean increased revenue for doctors, over current reimbursement structures.

Likewise, when the Food and Drug Administration approved a new drug for Alzheimer's disease called aducanumab, CMS had to decide how and when to pay for it – a fiscally and ethically fraught regulatory challenge. I asked Marcia to explain the possible decisions CMS might make and which she thought they should. She quickly produced an insightful memo that predicted exactly the path they eventually took and explained why, culling from academic literature across many disciplines and past regulatory decisions on similarly controversial drugs and devices. Her work enabled me to engage thoughtfully and quickly on the topic in conversation with academics, patients and other stakeholders, and the media. The top-notch quality of work Marcia produces gives me the greatest confidence in her ability to climb learning curves quickly and to distill the most complex topics into simple terms – all of which foreshadow certain success as a litigator and as a clerk.

I was not surprised when Marcia's exam was one of the two best in my Health Law and Policy class this spring. I teach a challenging course that covers topics ranging from legal obligations in the patient/provider relationship, health care financing, complex regulation such as fraud and abuse and antitrust, and public health law. She grasped all areas of the course equally well. Her answers on the short answer section of the exam were nearly perfect, and I used them in the model answer for my students. This section seeks to see if students can connect doctrine and policy concerns and addressed issues ranging from ERISA preemption to state and federal law on tax exemption to the Affordable Care Act's family glitch, a regulation that left some families who are offered job-based coverage unable to afford health insurance. The quality of Marcia's exam and her consistent and constructive participation in the class earned her an A+ (I was delighted but not surprised to see her at the top of the list when the registrar sent me the list of grades with names attached.).

Marcia's law review note, which I am supervising, will make a strong contribution at the intersection of health law and administrative law. She is considering how two of the health law cases in front of the Supreme Court this session (American Hospital Association v. Becerra and Becerra v. Empire Health Foundation) could bear on doctrine of administrative deference and how these complicated cases illuminate the delicacy of how the courts engage with agency work. This piece evinces her ability to draw on technocratic details to make unique, structural observations.

Marcia possesses a fine mind and well-honed research, writing, and analytical skills, but I especially value two other qualities that are less evident on paper and that make her stand out among her peers. The first is her tenacity. Marcia is hearing impaired, which means that she faces more obstacles than our average student, especially during a pandemic when masks impede her ability to lip read. I have watched Marcia navigate a series of new jobs and semesters with changing supervisors, professors, classrooms, and norms. She persists at setting up the systems she needs for success and does so in a respectful and efficient way. My class, for example, posed some novel challenges, including my use of small-group breakout exercises in class. Marcia quickly flagged concerns, and we worked together to devise a seamless solution.

Allison Hoffman - ahoffman@law.upenn.edu - (215) 898-8631

The other quality I appreciate is Marcia's good humor. She can laugh even in the hard moments, which helps others do so as well. She's has helped to weave a strong fabric among my RAs, who all enjoy working together and collaborate well on research questions.

Marcia is a force of nature and will be an extremely successful lawyer and, even more, a leader among lawyers. She has fully embraced all aspects of law school. Her resume is a testament to this fact. She is Philanthropy Editor on the Penn Law Review, a Morris Fellow mentoring new 1Ls, a top competitor in the Keedy Cup moot court competition, and an officer in Penn Law Lambda. I can say with the greatest confidence that she will be an effective and devoted clerk and member of chambers. Please do not hesitate to reach out to me if you would like to discuss her candidacy further. My cell phone and email are below.

Sincerely,

Allison K. Hoffman
Professor of Law
Email: ahoffman@law.upenn.edu
Tel: 937-271-4346 (cell)

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

June 11, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Re: Clerkship Applicant Marcia Foti

Dear Judge Robinson:

I am delighted to recommend Marcia Foti for a clerkship in your chambers. Marcia was a student in my first-year course in Civil Procedure and was a regular participant in my weekly office hours. We have discussed her career goals and how a clerkship would advance them. I have a very good sense of her ability and potential.

Marcia came to Penn Law after graduating from Stanford and working for six years as an analyst and senior policy analyst on global health policy issues at Boston Scientific. At Stanford she majored in political science, with a minor in economics, and served as a teaching assistant and undergraduate research assistant.

My course in Civil Procedure is generally considered the most difficult of the required first-year courses. In normal times, I call on students without prior notice; they are expected to be prepared, and I engage a few per class in extended dialogues about the assigned reading. The Fall of 2020 was not, of course, normal times, and I was forced to teach, and my students to learn, virtually. Having spent most of the preceding summer struggling to figure out how best to teach virtually, I decided to make only minor changes, including by designating a panel of four to five students in advance of each class.

Marcia acquitted herself well both in responding to my questions and in following up with astute questions of her own. She was also a regular and active participant in my weekly virtual office hours, where her command of the material was evident, as also her interest in policy questions raised by the doctrine we studied. Marcia's examination paper was one of the three or four best in a very bright class. She tackled difficult doctrinal issues with aplomb and demonstrated unusual facility in teasing out underlying policy questions where the law ran out.

Marcia's outstanding performance in my course was no outlier. She has had a superb academic record at Penn Law in a wide variety of courses demanding quite different skills. That she was able to compile such a record in these times is particularly impressive given the challenges for one whose hearing is impaired – Marcia has moderate-to-severe hearing loss in both ears and wears hearing aids to help correct it – and who must adjust to the vagaries of remote learning technology and, more recently, to the obfuscations of facial masks. It is no surprise that Marcia was selected to the Law Review or that her peers chose her as Philanthropy Editor for Volume 171.

Marcia has continued to demonstrate the interest in research that was evident in her undergraduate career at Stanford, leveraging her experience at Boston Scientific and course work at Penn Law in work as a research assistant for my colleague, Alison Hoffman. She has also been active in co-curricular and extra-curricular activities in addition to Law Review, notably by participating in our moot court competition and serving as a Morris Fellow, a program that enables carefully selected upper-level students to serve as mentors to 1L's. In truth, Marcia is perfect for that role, bringing to it a winning combination of serious purpose and infectious enthusiasm that endears her to students and faculty alike.

Marcia plans a career in litigation focused on health and administrative law. She understands how valuable a clerkship can be to the development of a first-rate litigator; she is eager to refine her legal reasoning, advocacy and writing skills (already excellent, as evidenced by her honors grade in Legal Practice Skills), and she very much wants the mentoring relationship that a good clerkship provides.

Marcia will be a superior law clerk. She is very smart, works hard, writes well, and is determined to excel. She is focused, articulate, and enthusiastic. She will be a valuable member of your chambers team, a genial colleague who pulls her weight and lights up the room. I recommend her without reservation.

Please feel free to contact me if I can provide additional information.

Sincerely,

Stephen B. Burbank
David Berger Professor
for the Administration of Justice
Emeritus
Tel.: (215) 898-7072
E-mail: sburbank@law.upenn.edu

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

June 11, 2023

The Honorable Beth Robinson
Federal Building
11 Elmwood Avenue
Burlington, VT 05401

Re: Clerkship Applicant Marcia Foti

Dear Judge Robinson:

Marcia Foti has tremendous grit, gravitas, and good humor. An outstanding legal writer and thinker, she is a fully formed adult with a dry wit and a true passion for the law. She will make an excellent clerk and I recommend her to you with tremendous enthusiasm.

Marcia is a standout legal writer and analyst who earned an A in Administrative Law despite a strictly enforced curve. Administrative Law is typically an especially challenging class for first-year students but not for Marcia. Having spent years working as a health policy analyst before law school, she delighted in the subject. Her professional experience mastering the complexities of Medicare regulations had developed just the kind of analytic and information processing skills law school—and a clerkship—demand. Her performance in class was consistently top notch. I design my exam to mirror real world assignments: it is a word-limited, 24-hour take home. Excelling requires not only spotting and analyzing issues well, but also demonstrating excellent writing and sound judgment as to which issues to focus on and at what depth. Students must engage in nuanced analysis and navigate factual and doctrinal complexity.

Marcia was a standout. She spotted all issues and wrote such excellent analyses that I tagged her treatment of 4 of them as possible models for the class (one or two is the norm among even my A students). Marcia did similarly well in my other assignments, earning A equivalents when cold called as well as on a group memo and individual essay about a recent regulation. Marcia has done similarly well in her other classes, earning A-range grades in every class save one. She is a strong and versatile writer, sharp thinker, and strong communicator who is quick on her feet. She will make an excellent clerk.

Marcia's grit, proven organizational skills, trust-inspiring aptitude, and incredible work ethic will make her a clerk in whom you can have full confidence. She embraces responsibility. In every one of her notable extracurriculars, she has taken on—and earned the requisite trust of her peers for—leadership roles. She serves on the Law Review, Moot Court, and Lambda boards, each a significant commitment. She is co-president of our student-run Democracy Law Project, the running of which is a substantial responsibility. She is the kind of person who thrives on surmounting challenges. Advised as a teenager that learning foreign languages would be too difficult given her congenital hearing loss, she instead studied three of them. Rather than assume she cannot excel at oral argument, she entered our moot court competition and proceeded to the quarterfinals. Marcia will meet any challenge by vanquishing it.

Down-to-earth, easy going, and wry, Marcia is a pleasure to get to know as well. Few students have so often brought a smile to my face. As a clerk, her levity will help carry her colleagues through hard work. Marcia’s two greatest loves outside of work are the outdoors and her rescue pup Beckett (knowing Marcia, I would guess that she chose that name for reasons both erudite and witty). Grounded and mature, she will get along well with others.

Sincerely,

Sophia Z. Lee
Professor of Law & History
Tel.: (215) 573-7790
E-mail: slee@law.upenn.edu

MARCIA FOTI
1070 Lake Avenue, Greenwich, CT 06831
(203) 521-5852 | mfoti@pennlaw.upenn.edu

WRITING SAMPLE

The attached writing sample is my final paper for my Remedies and Litigation Strategy class during Spring 2023. Our assignment was to write a paper on any topic of interest in remedies. I selected potential reforms to the Employee Retirement Income Security Act of 1974 (ERISA) remedies for health insurance denials. I chose this topic because it provided me with an opportunity to research how we could more adequately compensate individuals for health insurance denials.

I conducted all necessary research for this assignment, and no one else has edited or contributed to this paper.

Marcia Foti
Remedies and Litigation Strategy

If Something is Broken, Fix It: Improving the Available Remedies for the Wrongful Denial of Health Care Benefits Under ERISA

Health reformers treat universal health insurance coverage as the Holy Grail. Monumental health care legislation has focused primarily on increasing the number of Americans covered by health insurance.[1] However, even as the number of insured Americans has risen, so have health care costs.[2] Health care costs outpace inflation in the United States.[3] To cope with increasing costs, insurers have turned to managed care mechanisms, such as utilization review, as a method of controlling these ballooning costs.[4] Unfortunately, these mechanisms put insured Americans at risk of having medically necessary care severely delayed or denied altogether. Health insurance denials are a source of financial pain and stress for Americans. This is made worse by the potential for the denial to be wrongful – the beneficiary was entitled to the care they requested but nevertheless the care was denied.

A plaintiff's ability to challenge their wrongful denial via a civil suit depends upon whether they receive their health insurance via their employer or not. Employer-sponsored health insurance

[1] *See* Katherine T. Vukadin, *Delayed and Denied: Toward an Effective ERISA Remedy for Improper Processing of Healthcare Claims*, 11 YALE J. HEALTH POL'Y L. & ETHICS 331, 332 (2011) (describing the focus of health care reform as focused on barriers to insurance).

[2] Imani Telsford, Shameek Rakshit, Matthew McGough, Emma Wager, & Krutika Amin, H*ow Has U.S. Spending on Healthcare Changed Over Time?*, PETERSON-KFF HEALTH SYSTEM TRACKER (Feb. 7, 2023), https://www.healthsystemtracker.org/chart-collection/u-s-spending-healthcare-changed-time/#Total%20national%20health%20expenditures,%20US%20$%20Billions,%201970-2020.

[3] Kelly M. Loud, *ERISA Preemption and Patients' Rights in the Wake of* Aetna Health Inc. v. Davila, 54 CATH. U. L. REV. 1039, 1041 (2005).

[4] *Id.*

is governed by the Employee Retirement Income Security Act of 1974 (ERISA),[5] and the only remedy available for challenging a wrongful denial of benefits is ERISA § 502(a)(1)(B). However, if individuals receive their health insurance through a non-ERISA plan, beneficiaries have an array of state law claims available to them.

Part I of this paper will describe the current state of health care benefits denials to demonstrate that wrongful denials are a real problem in the health care system. Part II will provide a background on the history of the Employee Retirement Income Security Act of 1974 (ERISA), ERISA preemption, and the remedies available for wrongful denial of benefits under ERISA plans. Part III will provide a background on non-ERISA plans, Medicare Advantage (MA) preemption, and the remedies available for the wrongful denial of benefits under non-ERISA plans. Part IV of this paper presents a path forward for legislative and regulatory reforms to ERISA's private right of action that would improve the ability of the 163 million Americans covered by ERISA health insurance plans to challenge wrongful insurance denials in court.[6] These reforms would ensure adequate compensation for beneficiary harm and shift the financial incentives for insurers away from denying care. Finally, this paper concludes by suggesting that this moment is a particularly opportune time for Congress to act to revise ERISA.

PART I. HEALTH CARE DENIALS

Insurance companies do not pay for treatments that are not medically necessary or are experimental and investigational. This ensures that doctors provide proper care and beneficiaries

[5] 29 U.S.C. §§ 1001-1461.

[6] *Health Insurance Coverage in America: Current and Future Role of Federal Programs: Hearing Before the S. Comm. on Finance*, 117th Cong. 2 (2021) [hereafter *Collins Testimony*] (statement of Sara R. Collins, Ph.D., Vice President, Health Care Coverage and Access, The Commonwealth Fund), https://www.commonwealthfund.org/sites/default/files/2021-10/Collins_Senate_Finance_Comm_Testimony_10-20-2021_final.pdf.

receive a high-quality product. However, insurers' ability to deny care for something as broad as "medical necessity" creates opportunities for wrongful denials.

For-profit insurance companies have financial incentives to err on the side of over-denying claims, since every denied claim is another dollar staying in the pocket of the insurer, leading to an increase in the number of potential wrongful denials.[7] For beneficiaries, on the other hand, wrongful denials are a source of financial pain and stress. They must undertake multiple levels of appeals, hoping the denial is overturned, or choose to pay the costs of the treatment themselves. But many beneficiaries are simply unable to absorb the costs.[8] 49 percent of Americans say they would be unable to pay for an unexpected $1,000 medical bill within 30 days.[9] If a beneficiary cannot pay, this converts to medical debt, which is already the largest source of debt in collections in the United States.[10] 33 percent of American adults have medical debt adding up to an estimated

[7] Insurance companies often rationalize over-denials by arguing that a denial does not prevent a beneficiary from receiving care; the decision only affects payment. *See* Patrick Rucker, Maya Miller, & David Armstrong, *How Cigna Saves Millions by Having Its Doctors Reject Claims Without Reading Them*, PROPUBLICA (Mar. 25, 2023, 5:00 AM), https://www.propublica.org/article/cigna-pxdx-medical-health-insurance-rejection-claims ("Cigna emphasized that its [algorithm system for flagging cases for denial] does not prevent a patient from receiving care – it only decides when the insurer won't pay.").

[8] Absorbing the cost varies greatly depending on the treatment. For example, a chest X-ray costs somewhere between $41 to $285. Sharon Lurye, *University of Pennsylvania Study Finds Frustration in Figuring Out the Cost of X-rays at Hospitals*, PHILLY VOICE (May 16, 2016), https://www.phillyvoice.com/upenn-study-finds-frustration-figuring-out-cost-x-ray-hospitals/. A more complicated procedure, like a stem-cell transplant, runs in the hundreds of thousands. Michael S. Broder, Tiffany P. Quock, Eunice Chang, Sheila R. Reddy, Rajni Agarwal-Hashmi, Sally Arai, & Kathleen F. Villa, *The Cost of Hematopoietic Stem-Cell Transplantation in the United States*, AM. HEALTH DRUG BENEFITS, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5726064/.

[9] This includes 68% of adults with low income, 69 percent of Black adults, and 63 percent of Latine/Hispanic adults. Sara R. Collins, Lauren A. Haynes, & Relebohile Masitha, *The State of U.S. Health Insurance in 2022: Findings from the Commonwealth Fund Biennial Health Insurance Survey*, COMMONWEALTH FUND (Sept. 29, 2022), https://www.commonwealthfund.org/publications/issue-briefs/2022/sep/state-us-health-insurance-2022-biennial-survey. This result is not surprising since, as of December 2022, 64% of Americans reported living paycheck to paycheck. Jessica Dickler, *64% of Americans are Living Paycheck to Paycheck – Here's How to Keep Your Budget in Check*, CNBC (Jan. 31, 2023, 10:17 AM), https://www.cnbc.com/2023/01/31/share-of-americans-living-paycheck-to-paycheck-jumped-in-2022.html.

[10] WHITE HOUSE BRIEFING ROOM, FACT SHEET: THE BIDEN ADMINISTRATION ANNOUNCES NEW ACTIONS TO LESSEN THE BURDEN OF MEDICAL DEBT AND INCREASE CONSUMER PROTECTION (Apr. 11, 2022),

$88 billion on consumer credit reports.[11] Given these numbers, it is hardly surprising that 46 percent of Americans say that they have skipped or delayed care due to cost concerns.[12]

Health care benefits denials are a mix of medical and administrative decisions, with the insurer balancing the beneficiary's health needs against the costs of the service.[13] In some cases this can be a legitimate cost-saving mechanism. For example, step therapy mandates that beneficiaries try lower-cost medications before they can move on to higher-cost ones.[14] In some cases, this catches doctors that are simply prescribing higher-cost name brand drugs for no necessary health reason.[15] However, this is not universal; sometimes there are legitimate reasons why a beneficiary might immediately require a higher-cost medication.

A health care denial can be either prospective or retrospective. A prospective denial occurs before treatment, through a process called prior authorization.[16] Insurers determine whether the

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https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/11/fact-sheet-the-biden-administration-announces-new-actions-to-lessen-the-burden-of-medical-debt-and-increase-consumer-protection/.

[11] *Id. See also* Collins, Haynes, & Masitha, *supra* note 9 (detailing that $88 billion of medical debt accounts for 58 percent of all debt-collection entries on credit reports, and adding that this is an underestimation of total medical debt since it does not include debt owed directly to providers).

[12] Collins, Haynes, & Masitha, *supra* note 9.

[13] *See* Peter D. Jacobson & Scott D. Pomfret, *Form, Function, and Managed Care Torts: Achieving Fairness and Equity in ERISA Jurisprudence*, 35 HOUS. L. REV. 985, 1036 (1998) (describing the mixed medical-administrative determination in *Corcoran v. United Healthcare, Inc*., 965 F.2d 1321 (5th Cir. 1992)). *But see Aetna Health Inc. v. Davila*, 542 U.S. 200, 220 (2004) (holding that a benefits determination is a fiduciary act, not a medical one, and "administrators making benefits determinations, even determinations based extensively on medical judgments, are ordinarily acting as plan fiduciaries . . . .").

[14] Martha Hostetter & Sarah Klein, *Taking Stock of Medicare Advantage: Benefit Design*, COMMONWEALTH FUND (March 31, 2022), https://www.commonwealthfund.org/blog/2022/taking-stock-medicare-advantage-benefit-design.

[15] *See* Brenda R. Motheral, *Pharmaceutical Step-Therapy Interventions: A Critical Review of the Literature*, 17 J. MANAGED CARE PHARMACY 143 (2011) (concluding that step-therapy programs can provide significant drug savings through the greater use of lower-cost alternatives).

[16] This is also sometimes called preauthorization or utilization review.

treatment is medically necessary; services deemed to be medically unnecessary will not be covered by the insurer.[17] Retrospective denials occur post-treatment, where an insurer reviews the bill to determine whether they will pay for the service. Prospective prior authorization denials generally leave beneficiaries the most harmed. While the financial consequences of denied payment after treatment is devastating, at least the beneficiary received the necessary medical treatment. However, prior authorization denials force beneficiaries to delay or forego the treatment altogether. This can be life-threatening or even fatal.[18]

Unfortunately, denials are not infrequent, even for relatively inexpensive procedures.[19] Initial submissions of health care claims are denied at a rate of approximately one in seven.[20] Insurers have begun using algorithms to make quicker coverage decisions.[21] The algorithms cross-reference the diagnosis and procedure codes.[22] If it determines that these are mismatched, it flags

[17] Loud, *supra* note 3, at 1041.

[18] An insurer's months-long delay in approving a bone marrow transplant procedure was fatal since the cancer had metastasized to the patient's brain by the time the approval was finally processed. The patient grew sicker and eventually died. *Bast v. Prudential Ins. Co.*, 150 F.3d 1003, 1006 (9th Cir. 1998). In another case, a beneficiary was bitten by a brown recluse spider. Her doctor ordered, among other things, that the patient wear a vacuum-assisted closure device and home visits from a nurse. The beneficiary's insurer refused to pay for these services, despite her doctor warning that discontinuation of these treatments could result in the beneficiary losing her leg. Eventually, the beneficiary had to undergo not one but two amputations. *Roark v. Humana, Inc.* 307 F.3d 298, 303-04 (5th Cir. 2002).

[19] See Karen Pollitz, Justin Lo, Rayna Wallace, & Salem Mengistu, *Claims Denials and Appeals in ACA Marketplace Plans in 2021*, Kaiser Family Foundation (Feb. 9, 2023), https://www.kff.org/private-insurance/issue-brief/claims-denials-and-appeals-in-aca-marketplace-plans/ ("[N]early 17% of in-network claims were denied in 2021. Insurer denial rates varied widely around this average, ranging from 2% to 49%.). *See also* Rucker, Miller, & Armstrong, *supra* note 7 (documenting the multiple appeals needed for a patient to get Cigna to pay for a $350 blood test).

[20] Vukadin, *supra* note 1, at 337.

[21] *See* Rucker, Miller, & Armstrong, *supra* note 7 (describing the flagging algorithms used by Cigna and UnitedHealthcare).

[22] *Id.*

the case to be denied.[23] This type of algorithmic review is not inherently malicious; it could be a legitimate method of assisting the doctors reviewing cases. These doctors could use the presence of a flag, alongside a thorough review of the beneficiary's record and the insurers coverage policy, to determine whether the service will be covered.[24] Instead, doctors on Cigna's payroll were signing off on these flagged cases in bunches without any review of the beneficiaries' files.[25] In two months, Cigna doctors denied over 300,000 requests for payment using this method, spending an average of 1.2 seconds with each file.[26] A couple of seconds is not enough time to determine whether care is or is not medically necessary; this procedure inevitably results in Cigna beneficiaries receiving wrongful denials.[27]

Nor is Cigna alone in having problems with wrongful denials. Recently, ProPublica published an exposé of UnitedHealthcare's mishandling of one of its beneficiaries, Christopher McNaughton.[28] McNaughton suffered from severe ulcerative colitis that caused debilitating side

[23] *Id.*

[24] *Id.* There are legitimate reasons why a diagnosis and procedure code might not "match." For example, the request may be for an off-label drug treatment. Or the patient may be contra-indicated for the "standard" treatment, necessitating a more "aggressive" option.

[25] *Id.*

[26] *Id.*

[27] *Id.* For example, a patient's diagnosis test for a suspected vitamin D deficiency was denied because "[r]ecords did not show you had a previously documented vitamin D deficiency." Of course, this is illogical. How can a patient document vitamin D deficiency ever if the insurer will not cover the test needed to document that the patient has the deficiency? *Id.*

[28] David Armstrong, Patrick Rucker, & Maya Miller, *UnitedHealthcare Tried to Deny Coverage to a Chronically Ill Patient. He Fought Back, Exposing the Insurer's Inner Workings.*, PROPUBLICA (Feb. 2, 2023, 5:00 AM), https://www.propublica.org/article/unitedhealth-healthcare-insurance-denial-ulcerative-colitis.

effects.[29] After years, it was finally brought under control by an expensive cocktail of drugs crafted by a Mayo Clinic specialist.[30] Internally, UnitedHealthcare (United) flagged his account as "high dollar" and sought a reason to deny his care.[31] Eventually, a doctor paid by United concluded that his treatment was "not medically necessary" because "United's policies for the two drugs taken by McNaughton did not support using them in combination."[32] This conclusion ignored evidence that McNaughton had already tried the drugs separately and at lower dosages and his condition failed to improve.[33] When the family appealed, United internally vowed that the appeals were pointless; they would never change their minds.[34] United lied to the family, saying that McNaughton's doctor had agreed to lower dosages of the medicines.[35] When a different medical reviewer concluded that McNaughton's treatment was medically necessary, United buried the report because the "wrong" doctor had reviewed it, and sent it back to the original doctor who denied the care.[36] In the end,

[29] McNaughton suffered with bloody diarrhea twenty times a day and severe stomach pain. He also suffered from arthritis and dangerous blood clots. Because his diarrhea had him spending so much time in the bathroom, he was completely incapacitated. *Id.*

[30] *See id.* (detailing the long process towards finding an effective treatment for McNaughton).

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

McNaughton brought suit in the Eastern District of Pennsylvania, and United settled, agreeing to pay care for the remainder of the school year.[37]

Wrongful denials are a prevalent part of the current health insurance regime. Beneficiaries may look to vindicate their rights in court, as McNaughton did. However, a beneficiary's ability to effectively do so is dictated, in part, on how they receive their health insurance.

PART II. AN OVERVIEW OF ERISA AND EMPLOYER-SPONSORED HEALTH INSURANCE PLANS

About 163 million Americans, or 60 percent of Americans under the age of 65, get their health insurance as an employment benefit.[38] As long as their employer is not the government or a church, their rights to challenge denials is governed by ERISA.[39] Congress enacted ERISA in 1974 in response to fraud and mishandling of private pension funds.[40] The legislation's primary goal was to provide comprehensive federal standards that would protect private employee pension programs from fraud and mismanagement by increasing the federal government's oversight role.[41]

[37] *Id.* Discovery allowed these internal documents to come to light; without them, it would have been impossible to know what had gone so wrong throughout the review process. McNaughton plans to continue his education at Penn State's law school; United will continue to be his insurer throughout his education. *Id.*

[38] Collins Testimony, *supra* note 6.

[39] *See* 29 U.S.C. § 1003(b) (exempting governmental plans and church plans from the provisions of ERISA).

[40] Loud, *supra* note 3, at 1044, 1068. "Misuse, manipulation, and poor management of pension trust funds are all too frequent. One financially ailing company tried to borrow over a million dollars from a subsidiary's pension pool for use as operating capital. . . . [A]nother firm routinely dips into its pension funds for cash to make acquisitions." *Id.* at n. 174 (quoting the introductory remarks of a senator describing the purpose of ERISA).

[41] Patricia A. Butler, *ERISA and State Health Care Access Initiatives: Opportunities and Obstacles*, COMMONWEALTH FUND (Oct 2000), https://www.commonwealthfund.org/sites/default/files/documents/___media_files_publications_fund_report_2000_oct_erisa_and_state_health_care_access_initiatives__opportunities_and_obstacles_butler_erisa_pdf.pdf#.

ERISA also provided broad preemption protections for employers.[42] Since employers have no requirement to provide benefits to their employees, Congress wanted to reduce the compliance burden.[43] Prior to ERISA, employers operating across state lines would have had to conform with each individual states' regulations and laws. After ERISA, employers only had to comply with federal regulations. This uniformity reduces administrative and regulatory burdens, helping to keep employers' administrative costs low.[44]

Even though Congress's primary motivation for ERISA was protecting employee pension programs, it has become one of the three most important federal health insurance laws, alongside the Affordable Care Act and the Medicare Act. Arguably, ERISA has become so important simply because Congress failed to fully anticipate the effects of ERISA on health insurance. Indeed, Congress spent no time considering how ERISA preemption would affect the health insurance market.[45] Additionally, the health insurance market has changed since 1974 in ways that Congress may have found difficult to predict even if they had adequately debated ERISA's impacts on health insurance. When ERISA was enacted, insurers tended to automatically pay claims after treatment

[42] *See infra* II.A. for more details.

[43] *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996).

[44] Carmel Shachar & I. Glenn Cohen, *Restoring the Preemption Status Quo:* Rutledge*, ERISA, and State Health Policy Efforts*, HEALTH AFFAIRS FOREFRONT (Dec. 17, 2020), https://www.healthaffairs.org/do/10.1377/forefront.20201216.308813/full/. *But see* Jacobson & Pomfret, *supra* note 13, at 1012 (arguing that uniformity was never a primary goal of ERISA).

[45] *See* Peter D. Jacobson, *The Role of ERISA Preemption in Health Reform: Opportunities and Limits*, J. L. MEDICINE & ETHICS 97-98 (2009) ("Part of this uncertainty [in how ERISA should be interpreted] resides in a statute that is poorly and ambiguously drafted, and largely applicable to pension plans rather than the way health care is now organized and delivered.")

and without much oversight.[46] Managed care mechanisms, which have increased the prevalence of wrongful denials, were not enacted until years later.

ERISA has cemented employer-sponsored health insurance as an important component of the American health care system and the American labor market. However, it has come with steep costs for beneficiaries, too. Employers have restructured their employee benefits plans to take advantage of ERISA's protections from state regulations and the limited plaintiff remedies available under ERISA.[47]

A. ERISA Preemption

ERISA has two preemptive effects on health insurance. ERISA's initial preemptive power comes from ERISA § 514, which provides, "[T]he provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ."[48] This preemption is limited by the savings clause, which "saves" state laws regulating insurance, banking, or securities.[49] Such laws "must also substantially affect the risk pooling arrangement between the insurer and the insured to be covered by ERISA's saving clause."[50] Finally, the "deemer" clause states that self-funded plans, where employers pay the cost of claims directly, cannot be "deemed to be an insurance company . . . or to be engaged in the business of insurance."[51]

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[46] Vukadin, *supra* note 1, at 333.

[47] *Id.* at 336.

[48] 29 U.S.C. § 1144(a).

[49] 29 U.S.C. § 1144(b)(2)(A).

[50] *Ky. Ass'n of Health Plans v. Miller*, 538 U.S. 329, 338 (2003).

[51] 29 U.S.C. § 1144(b)(2)(B). Self-insured plans often contract for administrative services from insurers, who provide claims processing and provider network assistance. *Self-Insured Plans,* HEALTHCARE.GOV, https://www.healthcare.gov/glossary/self-insured-

§ 514 preemption affects the states' ability to pass laws or regulations affecting self-funded health insurance plans.[52] For example, states cannot require that self-funded insurers cover certain health benefits or report claims to a state database.[53] This preemption is most often used by insurers as a defense.[54] This has led to an counterintuitive effect: while Congress intended ERISA to increase regulation and oversight of private pension funds, ERISA ended up significantly decreasing regulation in the health insurance space.[55]

The second type of ERISA preemptive effect on health insurance is the preemption of state law claims. ERISA § 502(a)(1)(B) prescribes the method by which beneficiaries can file civil actions to "recover benefits due to him under the terms of the plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."[56] While state laws providing private rights of action survive § 514 preemption via the savings clause since they regulate insurance, they are preempted by § 502 because the Supreme Court has held that allowing any state to provide additional causes of action for wrongful denial of benefits would

plan/#:~:text=Type%20of%20plan%20usually%20present,'%20and%20dependents'%20medical%20claims. For example, the University of Pennsylvania Student insurance is self-funded. However, Penn student insurance cards say "Aetna," and Aetna makes the decisions on what is or is not covered for Penn students.

[52] Shachar & Cohen, *supra* note 44.

[53] *See Am. Med. Sec., Inc. v. Bartlett*, 111 F.3d 358 (4th Cir. 1997) (holding that Maryland could not mandate that self-funded employee health benefit plans with stop-loss insurance to cover the 28 required benefits); *Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. 312, 326 (2016) (holding that a Vermont statute requiring all health insurers file claims data with the state was preempted by ERISA).

[54] James W. Kim, *Managed Care Liability, ERISA Preemption, and State "Right to Sue" Legislation in* Aetna Health, Inc. v. Davila, 36 Loy. U. Chi. L. J. 651, 659 (2005), https://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1239&context=luclj.

[55] Jacobson & Pomfret, *supra* note 13, at 988.

[56] 29 U.S.C. § 1132(a)(1)(B).

contradict Congress's intent to make § 502 the sole private right of action available. [57] Because ERISA's "preemptive force [is] so extraordinary and all-encompassing . . . it converts an ordinary state-common-law complain into one stating a federal claim for purposes of the well-pleaded-complaint rule."[58] Under complete preemption, state actions are removable to federal court and any state law claims relating to an ERISA benefit plan are preempted and subject to dismissal. [59]

The landmark Supreme Court case discussing § 502 preemption is *Aetna v. Davila*.[60] The plaintiffs brought torts claims against Aetna for its failure to exercise ordinary care under the Texas Health Care Liability Act (THCLA).[61] The first plaintiff, Juan Davila, was prescribed Vioxx to treat arthritis pain, but Aetna refused to pay for it.[62] As a result, Davila took Naprosyn, had a severe adverse reaction to the drug, and had to be hospitalized.[63] The second plaintiff, Ruby Calad, had a major surgery and her doctor wanted to keep her at a hospital for post-surgery monitoring, but Cigna denied any stay beyond the first night.[64] After Calad left the hospital, she suffered serious post-surgical complications.[65]

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[57] *Aetna Health Inc. v. Davila*, 542 U.S. 200, 213, n. 4 (2004). As a side note, if ERISA § 502 did not exist, it seems like existing § 514 doctrine preempts state law causes of actions for self-funded plans. However, because § 502 exists, I could find no cases that evaluated the deemer clause in the context of a state-provided cause of action.

[58] BLACK'S LAW DICTIONARY 303 (8th ed. 2004).

[59] *Moscovitch v. Danbury Hosp.*, 25 F. Supp. 2d 74, 78-79 (D. Conn. 1998)

[60] *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004).

[61] *Id.* at 204.

[62] *Id.*

[63] *Id.*

[64] *Id.* at 205, 211.

[65] *Id.* at 205.

The Supreme Court evaluated whether THCLA was implicated by § 514 preemption. It found that THCLA was a law regulating insurance for the purpose of the savings clause, and therefore was not subjected to preemption under § 514.[66] However, the state cause of action under the THCLA fell completely within the scope of § 502(a)(1)(B).[67] Since § 502(a)(1)(B) provides the exclusive recourse for recovery for wrongful denials, all the plaintiffs' state law claims were preempted.[68]

Scholars argue that *Davila* demonstrates that the Supreme Court has fundamentally misinterpreted Congress's intent in enacting ERISA. ERISA was designed to "protect the interests of participants in employee benefits plans."[69] The legislation was a floor that provided the "minimum standard[] . . . [to] assur[e] the equitable character of [benefit] plans."[70] In contrast with that intent, the Supreme Court's existing preemption doctrine allows insurers to escape liability for the torts they have committed.[71]

Additionally, the Congressional records indicate that Congress never intended for § 502 to be the sole cause of action for wrongful denials. Instead, Congress thought the federal courts would supplement ERISA with a robust federal common law tailored to ERISA and its needs.[72] Upon

[66] *Id.* at 216-19.

[67] *Id.* at 208-14.

[68] *See id.* at 209 ("Therefore, any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted.").

[69] 29 U.S.C. § 1001(b).

[70] 29 U.S.C. §1001(a).

[71] Jacobson & Pomfret, *supra* note 13, at 989, 1010.

[72] *See Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 156 (1985) (Brennan, J., concurring) (discussing Congress's intention that the courts would develop a federal common law of ERISA).

presenting the Conference Report to the full Senate, Senator Javits stated, "It is also intended that a body of Federal substantive law will be developed by the courts to deal with issues concerning rights and obligations under private welfare and pension plans."[73] Likewise, the legislative history makes it clear that Congress never clearly demonstrated an intent to preempt state regulation of health care, which is an area that states have traditionally regulated.[74] Therefore, experts argue that courts should not read have read ERISA preemption so broadly as to inhibit valuable protection for plan participants.[75] Unfortunately, the existing ERISA preemption doctrine leaves only § 502 and its limited remedies.

B. Remedies Available for Wrongful Denial of Benefits Under ERISA Plans

ERISA mandates several interim steps before a suit can be brought. When a claim for benefits is denied, the plan must "provide adequate notice in writing . . . setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant."[76] Then a plaintiff must completely exhaust the internal administrative reviews available before proceeding to a suit.[77] The employer has discretion to structure its own internal review process, but most adapt

[73] 120 CONG. REC. 29, 942 (1974) (statement of Sen. Javits)

[74] *See* Jacobson & Pomfret, *supra* note 13, at 1004 ("[B]road preemption divests states of authority in many areas they have traditionally regulated, especially health care. There is no indication in the legislative history that Congres intended such far-reaching consequences."); James E. Holloway, ERISA, Preemption and Comprehensive Federal Health Care: A Call for "Cooperative Federalism" to Preserve the States' Role in Formulating Health Care Policy, 16 CAMPBELL L. REV. 405, 421-22 (1994) (finding that health care regulation is traditionally an area subject to state police powers).

[75] Jacobson & Pomfret, *supra* note 13, at 1039.

[76] 29 U.S.C. § 1131(1).

[77] Vukadin, *supra* note 1, at 345.

two levels of internal mandatory appeals.[78] If a plaintiff tries to bring a suit before completing all levels of review, the case will be dismissed.

Once a plaintiff has exhausted all administrative reviews, § 502 prescribes the only method by which beneficiaries can file an action to "recover the benefits due to him under the terms of the plan."[79] The claim is not adjudicated in front of a jury.[80] Instead, the court reviews the administrative record and, with deference to the insurers' decisions, determines whether the decision to deny benefits was reasonable.[81] The administrative record is comprised of the documents used by the insurer during the claims process when deciding to deny the claim. Some limited additional discovery is allowed, but there is a strong preference against allowing it.[82] However, "very good reason is needed to overcome the strong presumption that the record on review is limited to the record before the [insurer]."[83]

The administrative record often contains medical jargon; for example, claims records typically use coding instead of descriptions. Diagnoses are provided via ICD-10-CM codes, of

[78] *Id.*

[79] 29 U.S.C. § 1132(a)(1)(B).

[80] Jury trials are not required by the Seventh Amendment for ERISA claims because the suit and the remedy are equitable in nature. *See, e.g., Zimmerman v. Sloss Equip., Inc.*, 835 F.Supp. 1283, 1292 (D. Kan. 1993) ("The clear weight of authority is against allowing jury trials in ERISA matters."); *Divane v. Nw. Univ.*, 953 F.3d 980, 993-94 (7th Cir. 2020) ("The Supreme Court has held there is no right to a jury trial on this type of claim.").

[81] *Firestone Tire & Rubber Co. v Bruch*, 489 U.S. 101, 109 (1989). Technically, if the plan does not grant discretion to the administrator to determine benefit eligibility and interpret plan terms, then the decision is to be reviewed de novo. However, in practice this is becoming increasingly rare. Vukadin, *supra* note 1, at 341.

[82] BRYAN D. BOLTON, JAMES A. DEAN, RYAN H. NILAND, E. FORD STEPHENS & SCOTT M. TRAGER, ERISA SURVEY OF FEDERAL CIRCUITS (2022).

[83] *Liston v. Unum Corp. Officer Sev. Plan*, 330 F.3d 19, 23 (1st Cir. 2003).

which there are more than 69,000.[84] Procedure codes can be coded using ICD-10-PCS or CPT codes, depending on the site of service.[85] It is often difficult to find a full description of a code, and even if a full description is found, a judge may not have the necessary medical training to determine whether the care is or is not medically necessary. Therefore, most judges will lack the requisite medical and reimbursement knowledge to properly interpret the administrative record. Meanwhile, the insurer's brief is likely to highlight that the reviewers at the insurance companies are medical experts (albeit on the insurer's payroll). With limited additional discovery allowed, judges will find it difficult to meaningfully evaluate whether the decision to deny benefits was unreasonable.

Even if a plaintiff successfully overcomes all these hurdles, § 502's private right of action provides a very limited set of remedies. Successful plaintiffs can only recover the amount of the benefit due under the terms of the plan and potentially attorney's fees.[86] Compensatory damages, including for pain and suffering, and punitive damages are not available. It does not matter whether the result is that the beneficiary is not made whole by the judgment.[87] And most plaintiffs will not be made whole. Consider the plaintiffs in *Davila*: even though Davila was hospitalized due to a severe adverse reaction to a drug he never would have had to take had the original drug been

[84] *International Classification of Diseases (ICD-10-CM/PCS) Transition – Background*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Nov. 15, 2015), https://www.cdc.gov/nchs/icd/icd10cm_pcs_background.htm

[85] There are more than 71,000 ICD-10-PCS codes, which are generally used to code inpatient medical services. *Id.* Outpatient and office procedures generally use CPT codes, of which there are more than 10,000. *CPT Codes, Then and Now*, AMERICAN MEDICAL ASSOCIATION (Aug. 4, 2015).

[86] 29 U.S.C. § 1132(g).

[87] Vukadin, *supra* note 1, at 345-46.

approved, all he could recover for a wrongful denial is the cost of the drug he was denied.[88] In some cases, the beneficiary has severely deteriorated or even died.[89]

Some judges have argued that beneficiaries could have mitigated the harms if only they had paid for the treatment themselves, out of pocket, and then sought reimbursement through the courts.[90] In reality, this is not a financial possibility for most Americans. They would need to carry the debt while exhausting administrative appeals and navigating the courts; the interest accumulation and credit score impacts would harm them and would not be compensated in a § 502 action. Therefore, for all practical purposes, the cost of pursuing litigation of an ERISA claim relative to the low potential for recovery in most cases will discourage potential plaintiffs from pursuing such claims.[91]

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[88] *Aetna Health Inc. v. Davila*, 542 U.S. 200, 205 (2004). In contrast, determining the exact recovery for Calad would be more difficult. Her doctor had requested an "extended" stay. The insurer is likely to argue the "extended" stay would only have been for a night or two extra. Calad might argue that the stay would have been a week. Either way, the stay would likely not be as expensive as a stay to resolve post-surgical complications.

[89] An insurer's months-long delay in approving a bone marrow transplant procedure was fatal since the cancer had metastasized to the patient's brain by the time the approval was finally processed. The patient grew sicker and eventually died. *Bast v. Prudential Ins. Co.*, 150 F.3d 1003, 1006 (9th Cir. 1998). In another case, a beneficiary was bitten by a brown recluse spider. Her doctor ordered, among other things, that the patient wear a vacuum-assisted closure device and home visits from a nurse. The beneficiary's insurer refused to pay for these services, despite her doctor warning that discontinuation of these treatments could result in the beneficiary losing her leg. Eventually, the beneficiary had to undergo not one but two amputations. *Roark v. Humana, Inc.* 307 F.3d 298, 303-04 (5th Cir. 2002).

[90] This is the doctrine of avoidable consequences. *See, e.g., DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 449 (3d Cir. 2003) ("He could have . . . paid for the tube himself and then later filed an action for reimbursement."); *Aetna Health Inc. v. Davila*, 542 U.S. 200, 205 (2004) ("Davila did not appeal or contest this decision, nor he did purchase Vioxx with his own resources and seek reimbursement."); *Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St. 3d 77, 86 (Ohio 2002) ("The motion for summary judgment was based on the doctrine of avoidable consequences, wherein defendants argued that Esther's suffering and death could have been avoided had she continued with IAC despite the lack of insurance coverage for it.")

[91] Kim, *supra* note 54, at 700. In Davila, the plaintiffs explained that the disparity in recovery between ERISA and state law motivated their desire to sue under THCLA. Specifically, THCLA provided the ability to recover compensatory and punitive damages. *Id.* at 680.

This remedy structure provides significant incentives for insurers to misbehave or, at the very least, to not resolve these disputes during the administrative appeals process. Even when a plaintiff is successful, insurers do not have any incentive to improve their review processes to reduce the number of wrongful denials. For an illustrative example, consider an insurer that implements a blanket, unwritten policy of denying every claim above $10,000, irrespective of medical necessity, and the insurer receives 1,000 such claims each year. The insurer would automatically save $10 million a year through these wrongful denials. Even if one-third of these beneficiaries proceeded through multiple rounds of appeals, sued under § 502(a)(1)(B), and won, the insurer would have to pay $3.33 million, plus some attorney's fees. Without punitive damages, they are shielded from the worst financial effects of litigation; they will still save millions of dollars through wrongful denials.[92] In reality, one-third of beneficiaries would never proceed to a suit; more than ninety percent of denials are never appealed.[93] ERISA provides an incentive for the insurer to act in bad faith, because it will never face the prospect of the dollar amounts hurting profits.[94] And, due to the limited right to discovery, it is unlikely the insurer's malfeasance will become public and subject the company to public pressure to change its methods. Despite Congress's intent for ERISA to serve as a method to protect beneficiaries, instead it protects insurers from accountability.[95]

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[92] Ian Lopez, *Long Covid Victims Denied Benefits Get Little Relief From Courts*, BLOOMBERG LAW (March 13, 2023, 5:35 AM), https://news.bloomberglaw.com/health-law-and-business/long-covid-victims-denied-benefits-get-little-relief-from-courts.

[93] Vukadin, *supra* note 1, at 337.

[94] *See* Lopez, *supra* note 95 ("There's no reason for an insurance company to approve a claim if they think they have any basis whatsoever to deny it, because the very worst thing that will happen to them is they will be sued and have to pay the benefits anyway.")

[95] Jacobson & Pomfret, *supra* note 13, at 989, 1010.

PART III. AN OVERVIEW OF NON-ERISA HEALTH INSURANCE PLANS

Not all Americans receive employer-sponsored health insurance. If the health insurance is not provided by an employer, or if the relevant employer is a government or a church, the health insurance plan is not covered by ERISA.[96] This includes: Medicare, covering elderly Americans; Medicaid, covering poor Americans; Tricare, covering the military and their families; the Children's Health Insurance Program (CHIP), covering poor children and, in some states, pregnant women; and private insurance, including insurance purchased on the state exchanges. Of all these, only Medicare Advantage contains a preemption clause.[97]

A. Medicare Advantage Preemption and Remedies

Under "traditional" Medicare, the government acts as the beneficiary's insurer. Claims are submitted to the Centers for Medicare and Medicaid Services (CMS) and the government pays the bill. Medicare covers services that are "reasonable and necessary."[98] As long as a procedure is not explicitly under a non-coverage determination by Medicare, generally Medicare will only deny a claim because of miscoding. A provider can correct the misbilling, resubmit, and the procedure will be covered.

Medicare beneficiaries have the option of enrolling in a Medicare Advantage (MA) plan instead. MA plans operate under risk-based contracts; Medicare pays a capitated sum monthly per-

[96] *Employee Retirement Income Security Act (ERISA)*, U.S. DEPARTMENT OF LABOR, https://www.dol.gov/general/topic/retirement/erisa#:~:text=In%20general%2C%20ERISA%20does%20not,compensation%2C%20unemployment%20or%20disability%20laws.

[97] 42 U.S.C. § 1395w-26(b)(3).

[98] *See Heckler v. Ringer*, 466 U.S. 602 (1984) (citing to 42 U.S.C. § 1395y(a)(1), which prohibits reimbursement for services that are not reasonable or necessary for the diagnosis or treatment of illness or injury).

beneficiary enrolled.[99] MA plans are required to pay for all medically necessary care for the beneficiary that falls within Medicare's benefits package.[100] To entice beneficiaries to enroll, MA plans often offer coverage beyond that of traditional Medicare, such as vision, hearing, and dental services.[101]

To control costs, MA plans often have more limited provider networks or implement utilization management tactics, like prior authorization and step therapy.[102] MA plans have a financial incentive to deny claims to increase profits.[103] Often, these denials are improper. A 2018 audit by the Department of Health and Human Services (HHS) Office of the Inspector General (OIG) found that between 2014 and 2016, MA plans overturned 75% of their own prior authorizations and payment denials at the first level of appeal.[104] During the same period, independent reviewers at higher levels of the appeals process overturned even more denials in favor of beneficiaries and providers.[105] Unfortunately, many beneficiaries and providers did not appeal; the audit found that only 1% of denials were appealed to the first level of appeal.[106] 45%

[99] Yash M. Patel & Stuart Guterman, *The Evolution of Private Plans in Medicare*, COMMONWEALTH FUND (Dec. 8, 2017), https://www.commonwealthfund.org/publications/issue-briefs/2017/dec/evolution-private-plans-medicare.

[100] OFFICE OF THE INSPECTOR GENERAL, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, OEI-09-16-00410, MEDICARE ADVANTAGE APPEAL OUTCOMES AND AUDIT FINDINGS RAISE CONCERNS ABOUT SERVICE AND PAYMENT DENIALS 1 (2018), https://oig.hhs.gov/oei/reports/oei-09-16-00410.pdf.

[101] Hostetter & Klein, *supra* note 14.

[102] *Id.*

[103] OFFICE OF THE INSPECTOR GENERAL, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, OEI-09-16-00410, MEDICARE ADVANTAGE APPEAL OUTCOMES AND AUDIT FINDINGS RAISE CONCERNS ABOUT SERVICE AND PAYMENT DENIALS 1 (2018), https://oig.hhs.gov/oei/reports/oei-09-16-00410.pdf.

[104] *Id.* at 7. CMS cited more than half of the audited MA plans for wrongfully denying requests for services or payments. *Id.* at 11.

[105] *Id.* at 9.

[106] *Id.* at 10.

of MA plans sent incorrect or incomplete denial letters, which may contribute to this 1% appeal rate, since incomplete or incorrect letters may inhibit beneficiaries' and providers' ability to appeal.[107]

MA contains a preemption clause, 42 U.S.C. § 1395w-26(b)(3), that provides, "The standards established under this part shall supersede any state law or regulation . . . with respect to MA plans which are offered by MA organizations under this part."[108] Courts agree that positive law and regulations would be preempted, but that some state common law claims may survive preemption.[109] In other words, if the state government passed a law creating a private right of action to challenge a MA plan's wrongful denials, that would be prohibited; but some cases challenging a wrongful denial based in state tort and contract law could proceed. To determine whether a state common law claim survives preemption, courts examine whether the common law cause of action would undermine CMS's authority.[110] However, due to a paucity of cases directly on point, it is difficult to determine whether a state common law claim for a medical denial would be preempted.[111] Only the District of New Mexico has addressed it, and the court held the claim would be preempted because the determination of medical necessity was entrusted to the MA plan by the Medicare Act.[112]

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[107] *Id.* at 12.

[108] 42 U.S.C. § 1395w-26(b)(3).

[109] *Cotton v. StarCare Med. Grp., Inc*., 183 Cal. App. 4th 437, 450 (2010).

[110] *Do Sung Uhm v. Humana, Inc.*, 620 F.3d 1134, 1153-57 (9th Cir. 2010).

[111] This is covered more in depth in III.B., but the paucity of claims is likely due to the lack of attorney's fees. With uncertainty about whether the claims will be preempted and with certainty that litigation will not result in attorney's fees, nobody has had the incentive to test the boundaries of the law.

[112] *Haaland v. Presbyterian Health Plan, Inc.*, 292 F. Supp. 3d 1222, 1231-32 (D.N.M. 2018).

B. Remedies Available for Wrongful Denial of Benefits Under Non-ERISA Plans

Federal law does not restrict the ability for plaintiffs to bring state law claims against non-ERISA plan providers. Likewise, plaintiffs can bring the suit at any time; they do not need to exhaust the appeals process before they can bring suit. State law claims grant plaintiffs access to jury trials, full discovery, and the full array of damages.

An illustrative example of how powerful the access to state law remedies can be is *Dardinger v. Anthem Blue Cross*.[113] The plaintiff had metastatic brain tumors which the doctor was treating with rounds of intra-arterial chemotherapy (IAC) after radiation therapy failed to shrink the tumors.[114] Anthem paid for the first three procedures of a twelve-procedure treatment program but denied payment for any additional procedures.[115] The treatment was delayed through the appeals process, which dragged on for months despite the urgency of cancer treatments.[116] Eventually, the beneficiary died from her tumors.[117] The plaintiffs sued under state law for breach of fiduciary duty, breach of contract, bad faith, intentional infliction of emotional distress, and wrongful death.[118] The case proceeded to trial in front of a jury who returned a verdict of $1350 on the breach of contract claim, $2.5 million on the bad faith claim, and $49 million – later reduced

[113] *Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St. 3d 77 (Ohio 2002).

[114] *Id.*

[115] *Id.*

[116] The doctor recommended continuing with IAC, as the first three treatments had already had tremendous success. However, "Esther was concerned about the financial impact of what the Dardingers believed could become over $100,000 in medical bills." *Id.* at 81.

[117] Tragically, her funeral was on November 10, and yet another denial letter for the IAC treatment arrived at their house on November 11. *Id.* at 85.

[118] *Id.* at 26.

to $30 million – in punitive damages.[119] The court also awarded attorney fees of $790,000.[120] In contrast with the available remedies under ERISA plans, the plaintiffs were fully compensated for their harms and the insurer was hit with sufficient punitive damages to change their behavior in the future.

However, the lack of attorneys' fee recovery can be a hurdle in these cases. For claims brought under state statutes, the statute can provide for recovery of attorneys' fees. In contrast, for claims brought under the common law, the American Rule governs. "[A]bsent statutory authority or a contractual agreement between the parties, each party to a litigation must bear its own attorneys' fees and costs and may not recover those fees and costs from an adversary."[121] As a result, successful plaintiffs cannot shift their fees to the defeated insurer. Therefore, the cost of bringing the suit could exceed whatever recovery they could obtain. This is particularly true given the deep pockets of insurers. They can afford to pay the most prestigious firms to defend them and engage in tactics through motions and discovery that make the litigation prohibitively expensive. Even a successful plaintiff may recover for their medical bills but still be left with yet another exorbitant bill they cannot possibly pay, with no possibility for recovery.

Even if an attorney is willing to proceed with a case on a contingency fee basis, the plaintiff may decide it is not worth the hassle. Insurers are repeat players in this space, whereas a plaintiff likely will only bring a single case in their lifetime. Because of ERISA preemption protections, many states have not focused on creating private rights of actions for non-ERISA plans, especially

[119] *Id.* at 90.

[120] *Id.*

[121] *Morris B. Chapman & Assocs., Ltd. v. Kitzman*, 739 N.E.2d 1263, 1271 (Ill. 2000).

since they would only be utilized by a small segment of the population that directly purchases their private health insurance.

Public insurers, for the most part, do not receive the same complaints as private insurers. Public insurance plans often do not enforce the same level of cost controls, so denials are much rarer to receive and easier to resolve.[122] Generally, the only complaints brought against Medicare are challenges of Medicare's National Coverage Determinations (NCDs).[123] Unlike private insurance coverage policies, these determinations are made through a procedure akin to notice-and-comment rulemaking, where the public has the opportunity to participate.[124] Sometimes, once an NCD is adapted, beneficiaries will challenge its legitimacy through the courts, but these challenges normally fail.[125]

PART III. HOW TO IMPROVE ERISA'S PRIVATE RIGHT OF ACTION

It is clear to the Supreme Court, Congress, and the public that the current state of ERISA leaves beneficiaries undercompensated for the harms suffered for wrongful denial of benefits. In her Davila concurrence, Justice Ginsberg, with Justice Breyer, joined "the rising judicial chorus

[122] This is true except for Medicare Advantage. However, MA is best understood as a mix of private and public; Medicare may be providing the MA plans with initial funds, but after that the private insurer takes over. This results in MA operating more like private plans than public ones.

[123] *Medicare Coverage Determination Process,* CMS.GOV (March 3, 2022, 6:48 AM), https://www.cms.gov/Medicare/Coverage/DeterminationProcess

[124] *Id.*

[125] *See, e.g., Friedrich v. Sec'y of Health & Hum. Servs.*, 894 F.2d 829, 838 (6th Cir. 1990) ("Having made a national coverage determination, the Secretary is not required to defend it in response to individual claims by every person who disagrees with the decision to deny coverage."). To be fair, CMS does not re-review its NCDs often, so it can be difficult to modify the coverage policy based on new evidence supporting the reasonableness and necessity of the treatment. *Medicare Coverage Determination Process,* CMS.GOV (March 3, 2022, 6:48 AM), https://www.cms.gov/Medicare/Coverage/DeterminationProcess

urging that Congress . . . revisit what is an unjust and increasingly tangled ERISA regime" and cure the "regulatory vacuum" of ERISA.[126]

Indeed, Congress is aware of ERISA's unintended consequences. During the mid to late 1990s and early 2000s, there was a healthy debate in Congress over whether ERISA should be amended to permit state-based tort litigation against managed care organizations.[127] Multiple Patients' Bill of Rights Acts have been enacted to try and improve this situation, but none have managed to amass enough support to pass.[128] Part of the failure has been focusing either on upending preemption or by trying to write health insurers out of the law altogether.[129] The Affordable Care Act (ACA) also contained some new patient appeals rights that impacted ERISA plans.[130] A denial must be accompanied with a letter that details the evidence reviewed and the rationale relied upon to make an adverse decision.[131] This helps the beneficiary better address the insurers' concern when appealing.[132] Insurers can no longer provide financial incentives to

[126] *Aetna Health Inc. v. Davila*, 542 U.S. 200, 222 (2004).

[127] Jacobson, *supra* note 45, at 96; Peter K. Stris, *ERISA Remedies, Welfare Benefits, and Bad Faith: Losing Sight of the Cathedral*, 26 Hofstra Labor & Employment L. J. 387, 399 (2009), https://law.hofstra.edu/pdf/academics/journals/laborandemploymentlawjournal/labor_vol26no2_stris.pdf.

[128] Loud, *supra* note 3, at 1062, 1064.

[129] *See* Kim, *supra* note 54, at 678-79 (detailing the number of legislative reforms contemplated that ultimately failed to pass).

[130] Note that these were not subjected to preemption because they were federally provided, not state provided, and therefore not preempted by the Supremacy Clause. However, there was a grandfathered clause, so some ERISA plan are not required to comply with these new rights.

[131] Juliette Forstenzer Espinosa, *Strengthening Appeals Rights for Privately Insured Patients: The Impact of the Patient Protection and Affordable Care Act*, PUBLIC HEALTH REPORTS (2012), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3366385/.

[132] For example, denials are not always wrongful or malicious. Sometimes a denial is simply because the doctor's office miscoded a 1 as a 2 or the medical record did not fully explain why previous treatments had failed. In the past, the patient may only receive notification of a denial without an explanation. Some patients may not have appealed,

reviewers to encourage higher benefit denial rates.[133] Finally, the ACA mandates that all plans offer external review rights, where an objective third party unaffiliated with the insurer reviews the case and determines whether the claim should be approved or denied. [134]

This demonstrates some Congressional willingness to amend ERISA to better bring it in line with its original intent. However, any proposals will be met with powerful opposition. Businesses and health insurance companies oppose narrowing ERISA's preemption provisions.[135] They often argue that the provision of employee benefits is voluntary and if it becomes too onerous, employers may decline to offer them. Because employer-sponsored health insurance covers a large swath of the population, it is important to take this concern seriously. Nevertheless, there are reasons to doubt this narrative. First, employer-sponsored health insurance began long before ERISA was passed in 1974; World War II-era laws that exempted health insurance from wartime wage controls, enabling unions to improve worker compensation through negotiation for health insurance benefits.[136] Even today, in stronger labor markets, employers often strengthen their benefits packages, including health insurance, knowing that this is a way to increase employee recruitment and retention.[137] Employers also receive valuable tax benefits for providing

thinking that the insurer conducted a thorough review of the correct information, but these beneficiaries would have been eligible for coverage if a correct file had been provided to the insurer.

[133] *Id.*

[134] *Id.*

[135] Vukadin, *supra* note 1, at 373.

[136] Aaron E. Carroll, *The Real Reason the U.S. Has Employer-Sponsored Health Insurance*, N.Y. Times (Sept. 5, 2017), https://www.nytimes.com/2017/09/05/upshot/the-real-reason-the-us-has-employer-sponsored-health-insurance.html.

[137] Aditya Gupta, Nikhil Mahajan, Carolina Malcher, Monica Qian, Matthew Scally, & Jeris Stueland, *Employers Look to Expand Health Benefits While Managing Medical Costs*, MCKINSEY & COMPANY (May 25, 2022),